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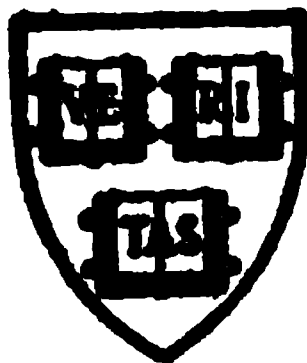
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO

FROM JULY 24, 1891, TO AUGUST 24, 1892.

CHARLES H. GILDERSLEEVE
REPORTER

VOLUME VI

62

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JUDGES AND OFFICERS
OF THE
SUPREME AND DISTRICT COURTS
OF THE
TERRITORY OF NEW MEXICO.
FROM 1846 TO 1895, BOTH INCLUSIVE.

COMPILED BY
JAMES H. PURDY
OF THE SANTA FE BAR.

CHIEF JUSTICES.

By the organic act, 1851, the supreme court was constituted of a chief justice and two associate justices. In 1887 a third associate justice was added; and in 1889 was added a fourth associate justice.

APPOINTED.	APPOINTED.
Joab Houghton 1846 by Gen. S. W. Kearney. Died January 31, 1876.	Henry L. Waldo 1876 Resigned.
Grafton Baker 1851	Chas. McCandless 1878 Resigned.
J. J. Davenport 1853	L. Bradford Prince 1879
Kirby Benedict 1858 Died at Santa Fe, New Mexico, 1875.	Samuel B. Axtell 1882 Died at Morristown, New Jersey, 1893.
John P. Slough 1866 Died at Santa Fe, New Mexico, December 17, 1867.	William A. Vincent 1885
John S. Watts 1868 Died in Indiana, in 1873.	Elisha V. Long 1885
Joseph G. Palen 1869 Died at Santa Fe, New Mexico, December, 1875.	James O'Brien 1889
	Thomas Smith 1893

JUDGES OF THE FIRST DISTRICT.

Headquarters at Santa Fe.

The First District, from 1846 to 1860, included the counties of Santa Fe, Santa Ana, and San Miguel. In 1860, the counties of Mora, Colfax, Taos, and Rio Arriba, were added. In 1887, the First District was made to include the counties of Santa Fe, San Juan, Rio Arriba, and Taos.

APPOINTED.	APPOINTED.
*Joab Houghton 1846 from New Mexico.	*L. Bradford Prince 1879 from New York.
*Grafton Baker 1851	*Samuel B. Axtell 1882 from California.
*J. J. Davenport 1853	**Reuben A. Reeves 1887 from Texas
*Kirby Benedict 1858 from Illinois.	**Wm. H. Whiteman 1889 from New Mexico.
*John P. Slough 1866 from Colorado.	**Edward P. Seeds 1890 from Iowa.
*John S. Watts 1868	**Napoleon B. Laughlin 1894 from New Mexico.
*Joseph G. Palen 1869 from New York.	
*Henry L. Waldo 1876 from New Mexico.	
*Chas. McCandless 1878 from Pennsylvania.	

* Chief Justice.
** Associate Justice.

ASSOCIATE JUSTICES, SECOND DISTRICT.

Headquarters at Albuquerque.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia, and (soon as organized) Socorro, Dona Ana, and Arizona. In 1860, the District was constituted of the counties of Bernalillo, Valencia, and Socorro. In 1889, Socorro county was transferred to the Fifth District.

APPOINTED.		APPOINTED.	
Antonio J. Otero.....	1846	John I. Reddick ...	1876
from New Mexico.		from Nebraska.	
John S. Watts.....	1851	Samuel B. McLin... ..	1877
from Indiana. Died, 1873.		from Florida. Died in Florida.	
Perry E. Brocchus....	1857	Samuel C. Parks. ...	1878
from Maryland. Died.		from Illinois.	
W. F. Boon.....	1859	Joseph Bell.....	1882
Sydney A. Hubbell	1861	from New York. Died in Cali-	
from New Mexico. Died at Las		fornia, 1897.	
Vegas, 1880.		William H. Brinker.....	1885
Perry E. Brocchus.....	1867	from Missouri.	
from Maryland. Died at Balti-		William D. Lee.....	1889
more.		from New Mexico.	
Hezekiah S. Johnson..	1870	Needham C. Collier	1893
from New Mexico. Died at Albu-		from Georgia.	
querque, 1873.			

ASSOCIATE JUSTICES, THIRD DISTRICT.

Headquarters at Taos, 1846-1860.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba. In 1860, those counties became part of the First District, organized of Dona Ana county. In 1887, the Third District was reorganized of Dona Ana and Grant counties, with headquarters at Las Cruces. In 189-, Sierra county was added, and in 1895, Silver City was designated as headquarters.

APPOINTED.		APPOINTED.	
Chas. Beaubien.....	1846	Daniel B. Johnson.....	1871
from New Mexico. Died at Taos,		from Minnesota.	
New Mexico, January, 1846.		Warren Bristol.....	1872
Horace Mower.....	1851	from Minnesota. Died, Deming,	
Kirhy Benedict	1853	New Mexico.	
from Illinois. Died at Santa Fe,		Stephen F. Wilson.....	1884
New Mexico.		from Pennsylvania.	
Wm. G. Blackwood.....	1858	Wm. F. Henderson..	1885
from South Carolina. Died in		from Arkansas. Died, Washing-	
New Mexico.		ton, D. C., 1890.	
Joseph G. Knapp ..	1861	John R. McFie ...	1889
Joab Houghton.....	1865	from New Mexico.	
from New Mexico. Died January		Albert B. Fall.....	1893
31, 1876.		from New Mexico. Resigned.	
Abraham Berger... ..	1869	Gideon D. Bantz.	1895
from Minnesota.		from New Mexico.	
Benjamin J. Waters.....	1870		
from Missouri.			

JUDGES AND OFFICERS.

V

ASSOCIATE JUSTICES, FOURTH DISTRICT.

Headquarters at Las Vegas.

This District was organized in 1887, of the counties of San Miguel, Colfax, Mora, and Lincoln. In 1889, Lincoln county became part of the Fifth District, and, in 1891, Guadalupe county was added, and, in 1893, Union county.

APPOINTED.		APPOINTED.	
Elisha V. Long.....	1889	Thomas Smith.....	1893
James O'Brien.....	1890	from Virginia.	
from Minnesota.			

ASSOCIATE JUSTICES, FIFTH DISTRICT.

Headquarters at Socorro.

This District was organized in 1889, of the counties of Socorro, Lincoln, with Chavez and Eddy counties when organized.

APPOINTED.		APPOINTED.	
Alfred A. Freeman.....	1890	Humphrey B. Hamilton	1895
from Washington, D. C.		from New Mexico.	

CLERKS OF THE SUPREME COURT.

Appointed by the Court.

APPOINTED.		APPOINTED.	
James M. Giddings.	1852	Rufus J. Palen.....	1873
of Missouri. Died, Fort Sumner,		of New York.	
189.		John H. Thompson.....	1877
Louis D. Sheets.....	1854	of Missouri.	
of Missouri.		Frank W. Clancy.....	1880
Augustine de Marle....	1856	of New Hampshire.	
Died, Santa Fe, New Mexico.		Charles M. Phillips.....	1883
Samuel Ellison.	1859	of New Jersey.	
of Kentucky. Died, Santa Fe,		Ruel M. Johnson.....	1886
July 20, 1889.		of Indiana.	
Wm. M. Gwynne.....	1866	Robert M. Foree.....	1887
of Ohio.		of Kentucky.	
Peter Connelly	1867	Summers Burkhart.....	1889
of New Mexico.		of West Virginia.	
Samuel Ellison ...	1868	Harry S. Clancy.....	1891
of Kentucky. Died, Santa Fe,		of New Hampshire.	
1889.		Page B. Otero.....	1893
William Breeden.....	1869	of New Mexico.	
of Kentucky.		George L. Wyllys ...	1894
Marshall A. Breeden.....	1872	of Virginia.	
of Kentucky.			

UNITED STATES ATTORNEYS.

APPOINTED.		APPOINTED.	
Frank P. Blair, Jr.....	1846	S. M. Ashenfelter.....	1871
from Missouri.		from Pennsylvania.	
Hugh N. Smith	1847	Thos. B. Catron.. ..	1872
from New Mexico.		from New Mexico.	
Elias P. West.....	1851	Sidney M. Barnes	1878
Wm. H. H. Davis.....	1853	from Arkansas.	
from Pennsylvania.		George W. Prichard.....	1883
Wm. Claude Jones.....	1855	from New Mexico.	
Richard H. Tompkins.....	1858	Joseph Bell.....	1884
from New Mexico.		from New Mexico.	
Theodore D. Wheaton.....	1860	Thomas Smith.....	1885
from New Mexico.		from Virginia.	
Merrill Ashurst....	1861	Eugene A. Fiske.....	1889
from Alabama.		from New Mexico.	
Stephen B. Elkins.....	1867	J. B. H. Hemingway.....	1893
from New Mexico.		from New Mexico.	

JUDGES AND OFFICERS.

ATTORNEYS-GENERAL.

Appointed by the Governor, and confirmed by the Legislative Assembly.

APPOINTED.		APPOINTED.	
Hugh N. Smith.....	1846	Charles P. Cleaver...	1862
of Missouri.		of Germany.	
Elias P. West.....	1848	Stephen B. Elkins.....	1866
Henry C. Johnson...	1852	of Missouri.	
of Pennsylvania.		Charles P. Cleaver.....	1867
Merrill Ashurst...	1852	of Germany. Died May 30, 1874.	
of Alabama. Died, Santa Fe,		Merrill Ashurst.....	1867
1869.		of Alabama.	
Theodore D. Wheaton....	1854	Thomas B. Catron.....	1869
of Missouri. Died, Ocate, New		of Missouri.	
Mexico, 1876.		Thomas F. Conway.....	1872
Richard H. Tompkins.....	1858	of Missouri.	
of Kentucky. Died.		Wm. Breeden.....	1873
Hugh N. Smith.....	1859	of Kentucky.	
of Missouri. Died, Santa Fe.		Henry C. Waldo..	1878
Spruce M. Baird.....	1860	of Missouri.	
of Texas. Died at Cimarron,		Wm. Breeden....	1878
New Mexico, 1873.		of Kentucky.	
Richard H. Tompkins.....	1860	Edward L. Bartlett .	1889
of Kentucky. Died at Santa Fe,		of Kansas. Solicitor General.	
1888.		John P. Victory	1895
		of New York. Solicitor General.	

UNITED STATES MARSHALS.

APPOINTED.		APPOINTED.	
Richard Dallum	1846	John Pratt.....	1866
John G. Jones.....	1851	from Kansas.	
Charles L. Rumley.....	1853	John Sherman, Jr	1876
Charles H. Merritt.....	1854	from Ohio. Died, Washington,	
Charles Blumner....	1856	D. C.	
from New Mexico. Died, Santa		A. L. Morrison.....	1881
Fe, 1872.		from Illinois.	
Charles P. Cleaver.	1858	Romulo Martinez... ..	1885
from New Mexico. Died, Tome,		from New Mexico.	
New Mexico, 1874.		Trinidad Romero.....	1889
Abram Cutler.....	1861	from New Mexico.	
from Kansas.		Edward L. Hall.	1893
		from New Mexico.	

LIST OF ATTORNEYS

Practicing in the Supreme Court of New Mexico between 1846 and 1893.

Allen, Samuel T.	Fountain, A. J.	Reynolds, James E.
Ashurst, Merrill	Fox, George W.	Riley, Chilion
Atkinson, H. M.	Frazer, John R.	Risque, John B.
Axtell, S. B.	Gary, Joseph E.	Ritch, Wm. G.
Bail, John D.	Gildersleeve, Chas. H.	Rodey, Bernard.
Bantz, Gideon D.	Green, T. A.	Russell, D. C.
Barbor, Geo. B.	Gwin, John M.	Rynerson, Wm. L.
Barnes, Sidney M.	Goodwin, Jesse C.	Salazar, Miguel
Barnes, R. P.	Graves, Wm. C.	Sena, Jose D.
Barr, A. J.	Harlee, A. H.	Shaw, James M.
Bartlett, Edward L.	Hazledine, Wm. C.	Shield, David P.
Bell, Chas. G.	Hewitt, W. Y.	Skinner, Wm. C.
Bell, John J.	Houghton, Joab	Sloan, Andrew
Bell, Joseph	Hoyt, Abram G.	Sloan, Wm. B.
Berger, Wm. M.	Hubbell, Sydney A.	Smith, Hugh N.
Bonham, Joseph F.	Jackson, C. L.	Smith, Thomas
Bowman, W. C.	Johnson, Henry C.	Sniffen, John S.
Breeden, Marshall A.	Jones, A. A.	Stearns, DeWitt O.
Breeden, William	Knaebel, G. W.	Springer, Frank
Bristol, Warren	Knaebel, John H.	Stevens, Benjamin
Bryan, D. J.	Koogler, John H.	Stone, W. S.
Burkhart, Summers	Laughlin, N. B.	Sulzbacher, Louis
Burns, Harrison	Leahy, J.	Terrill, Wm. C.
Catron, Thomas B.	Lee, Wm. D.	Thompson, F. A.
Caypless, Edgar	Lemon, George	Thornton, Wm. T.
Chaves, J. Francisco	Leonard, Ira E.	Tiffany, I. S.
Childers, W. B.	Long, E. V.	Tompkins, Richard H.
Clancy, Frank W.	Masterson, Murat	Trimble, L. S.
Clarke, Fred W.	McComas, Chas. C.	Tuley, Murray F.
Collier, N. C.	McComas, H. L.	Van der Veer, P. L.
Conway, Thomas F.	McFie, John R.	Veeder, John D. W.
Crane, William F.	Mills, Melvin W.	Victory, John P.
Davis, Wm. W. H.	Newcomb, S. B.	Vincent, Wm. A.
Douglass, Thomas G.	O'Bryan, J. D.	Waitman, Hanson
Downs, Francis	Pickett, H. L.	Waldo, Henry L.
Dunne, Edmund F.	Pierce, W. L.	Warner, Milton J.
Fall, A. B.	Pilliams, Palmer J.	Warren, Henry L.
Elliott, A. B.	Posey, G. Gordon	Watson, W.
Emmett, LaFayette.	Preston, George C.	West, Elias B.
Fergusson, H. V.	Price, Edward V.	Wheaton, Theodore
Field, Neill B.	Prichard, George W.	Whiteman, Wm. H.
Fielder, Idus L.	Prince, L. Bradford	Woodward, Jesse B.
Fiske, Eugene A.	Purdy, James H.	Yeaman, Caldwell
Fitch, J. G.	Quinn, James H.	Young, J. Morris
Fort, L. C.	Read, Benj. M.	

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ASSOCIATE JUSTICES, SECOND DISTRICT.

Headquarters at Albuquerque.

The Second District, from 1846 to 1860, was composed of the counties of Bernalillo, Valencia, and (soon as organized) Socorro, Dona Ana, and Arizona. In 1860, the District was constituted of the counties of Bernalillo, Valencia, and Socorro. In 1889, Socorro county was transferred to the Fifth District.

APPOINTED.		APPOINTED.	
Antonio J. Otero.....	1846	John I. Reddick	1876
from New Mexico.		from Nebraska.	
John S. Watts.....	1851	Samuel B. McLin... ..	1877
from Indiana. Died, 1873.		from Florida. Died in Florida.	
Perry E. Brocchus....	1857	Samuel C. Parks.	1878
from Maryland. Died.		from Illinois.	
W. F. Boon.....	1859	Joseph Bell.....	1882
Sydney A. Hubbell	1861	from New York. Died in California, 1887.	
from New Mexico. Died at Las Vegas, 1880.		William H. Brinker.....	1885
Perry E. Brocchus.....	1867	from Missouri.	
from Maryland. Died at Baltimore.		William D. Lee.....	1889
Hezekiah S. Johnson..	1870	from New Mexico.	
from New Mexico. Died at Albuquerque, 1873.		Needham C. Collier	1893
		from Georgia.	

ASSOCIATE JUSTICES, THIRD DISTRICT.

Headquarters at Taos, 1846-1860.

The Third District, from 1846 to 1860, consisted of the counties of Taos and Rio Arriba. In 1860, those counties became part of the First District, organized of Dona Ana county. In 1887, the Third District was reorganized of Dona Ana and Grant counties, with headquarters at Las Cruces. In 189-, Sierra county was added, and in 1895, Silver City was designated as headquarters.

APPOINTED.		APPOINTED.	
Chas. Beaubien.....	1846	Daniel B. Johnson.....	1871
from New Mexico. Died at Taos, New Mexico, January, 1846.		from Minnesota.	
Horace Mower.....	1851	Warren Bristol.....	1872
Kirby Benedict	1853	from Minnesota. Died, Deming, New Mexico.	
from Illinois. Died at Santa Fe, New Mexico.		Stephen F. Wilson.....	1884
Wm. G. Blackwood.....	1858	from Pennsylvania.	
from South Carolina. Died in New Mexico.		Wm. F. Henderson..	1885
Joseph G. Knapp ..	1861	from Arkansas. Died, Washington, D. C., 1890.	
Joab Houghton.....	1865	John R. McFie	1889
from New Mexico. Died January 31, 1876.		from New Mexico.	
Abraham Berger... ..	1869	Albert B. Fall.....	1893
from Minnesota.		from New Mexico. Resigned.	
Benjamin J. Waters.....	1870	Gideon D. Bantz.	1895
from Missouri.		from New Mexico.	

JUDGES AND OFFICERS.

V

ASSOCIATE JUSTICES, FOURTH DISTRICT.

Headquarters at Las Vegas.

This District was organized in 1887, of the counties of San Miguel, Colfax, Mora, and Lincoln. In 1889, Lincoln county became part of the Fifth District, and, in 1891, Guadalupe county was added, and, in 1893, Union county.

APPOINTED.	APPOINTED.
Elisha V. Long..... 1889	Thomas Smith..... 1893
James O'Brien..... 1890	from Virginia.
from Minnesota.	

ASSOCIATE JUSTICES, FIFTH DISTRICT.

Headquarters at Socorro.

This District was organized in 1889, of the counties of Socorro, Lincoln, with Chavez and Eddy counties when organized.

APPOINTED.	APPOINTED.
Alfred A. Freeman..... 1890	Humphrey B. Hamilton 1895
from Washington, D. C.	from New Mexico.

CLERKS OF THE SUPREME COURT.

Appointed by the Court.

APPOINTED.	APPOINTED.
James M. Giddings. 1852	Rufus J. Palen..... 1873
of Missouri. Died, Fort Sumner, 1890.	of New York.
Louis D. Sheets..... 1854	John H. Thompson..... 1877
of Missouri.	of Missouri.
Augustine de Marle.... 1856	Frank W. Clancy..... 1880
Died, Santa Fe, New Mexico.	of New Hampshire.
Samuel Ellison. 1859	Charles M. Phillips..... 1883
of Kentucky. Died, Santa Fe, July 20, 1889.	of New Jersey.
Wm. M. Gwynne..... 1866	Ruel M. Johnson..... 1886
of Ohio.	of Indiana.
Peter Connelly 1867	Robert M. Foree..... 1887
of New Mexico.	of Kentucky.
Samuel Ellison 1868	Summers Burkhart..... 1889
of Kentucky. Died, Santa Fe, 1889.	of West Virginia.
William Breeden..... 1869	Harry S. Clancy..... 1891
of Kentucky.	of New Hampshire.
Marshall A. Breeden..... 1872	Page B. Otero..... 1893
of Kentucky.	of New Mexico.
	George L. Wylls 1894
	of Virginia.

UNITED STATES ATTORNEYS.

APPOINTED.	APPOINTED.
Frank P. Blair, Jr..... 1846	S. M. Ashenfelter..... 1871
from Missouri.	from Pennsylvania.
Hugh N. Smith 1847	Thos. B. Catron.. . . . 1872
from New Mexico.	from New Mexico.
Elias P. West..... 1851	Sidney M. Barnes 1878
Wm. H. H. Davis..... 1853	from Arkansas.
from Pennsylvania.	George W. Prichard..... 1883
Wm. Claude Jones..... 1855	from New Mexico.
Richard H. Tompkins..... 1858	Joseph Bell..... 1884
from New Mexico.	from New Mexico.
Theodore D. Wheaton..... 1860	Thomas Smith..... 1885
from New Mexico.	from Virginia.
Merrill Ashurst.... 1861	Eugene A. Fiske..... 1889
from Alabama.	from New Mexico.
Stephen B. Elkins..... 1867	J. B. H. Hemingway..... 1893
from New Mexico.	from New Mexico.

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REPORT OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF NEW MEXICO.

[No. 383. July 24, 1891.]

PEDRO PEREA, PLAINTIFF IN ERROR, v. THE COL-
ORADO NATIONAL BANK OF TEXAS,
DEFENDANT IN ERROR.

GARNISHMENT—ANSWER—ISSUE—BURDEN OF PROOF—VERDICT.—In a proceeding by garnishment, by a judgment creditor, under an execution issued upon the judgment against a debtor of the defendant in the execution, under section 2159, Compiled Laws, where the garnishee answered that he was not indebted to the defendant, that he had no property in his possession belonging to defendant, and that his transactions with him were not fraudulent, the issue was not only as to the facts of indebtedness and fraud, but also as to the amount of indebtedness; and a verdict of the jury simply that the answer was not true was a finding only upon a part of the issue unauthorized by the statute, and insufficient to support a judgment. *Patterson v. U. S.*, 2 Wheat. 222.

2. The answer of the garnishee was *prima facie* evidence of the facts therein set forth, throwing the burden of proof on the execution plaintiff; and evidence offered to controvert the answer presented an issue of fact for the jury. The court therefore erred in directing the jury to find for the plaintiff.

ERROR, from a judgment for plaintiff, to the Second Judicial District Court, Bernalillo County. Judgment reversed.

VOL. 6 N. M.—1

(1)

CATRON, KNAEBEL & CLANCY for plaintiff in error.

W. B. CHILDERS for defendant in error.

STATEMENT.

The plaintiff in error was, on the eleventh day of June, 1887, summoned as the garnishee of Jesus M. Perea, his brother, under an execution issued out of the district court for Bernalillo county upon a judgment of that court in favor of defendant in error and against said Jesus M. Perea for \$4,794.90, rendered on the third day of May, 1887. At the September term, 1887, allegations were filed setting up that the garnishee had received twenty thousand head of sheep from the judgment debtor, and had never paid any sum whatever therefor, but was still indebted for the same; that the sheep were so received for the purpose of hindering, delaying, and preventing the creditors of Jesus M. Perea from collecting their indebtedness; and that the garnishee was indebted to the judgment debtor in a large sum for goods, wares, and merchandise, and in the sum of \$34,000 for real estate. With these allegations were filed interrogatories to the garnishee, inquiring fully into the transactions between the garnishee and the said Jesus M. Perea. At the same time the garnishee filed his answer, admitting that he had received the sheep, but denying that he had not paid for them, and denying that he received them for the purpose alleged, and denying that he was indebted to said Jesus M. Perea in any sum. By his answer to the interrogatories he showed that on the twenty-ninth day of January, 1887, Jesus M. Perea sold and transferred to him said sheep and some other personal property, and a considerable amount of real estate, the consideration thereof being the assumption and payment by Pedro Perea of a large number of debts of said Jesus M. Perea, aggregating about

\$100,000, a considerable portion of which had at the time of answering been actually paid. The consideration expressed in the written transfers of said property was \$60,000 for the personal property and \$34,000 for the real estate. Plaintiff filed also a denial of the truth of the answer. The case was tried upon the issue thus formed, and by direction of the court the jury returned a verdict in favor of the plaintiff below, and a judgment was entered against the garnishee for \$5,604.70 and costs. The defendant made a motion for a new trial, which was denied. The judge afterward refused to sign a bill of exceptions, on the ground that the time for the presentation of the same had expired, and that he had no power to do so. He subsequently did sign a bill certifying an exception to his refusal to settle the first bill tendered. The bill signed contains the bill which the judge refused to settle and the amendments proposed by counsel for the plaintiff below.

OPINION.

LEE, J.—This was a garnishment proceeding under an execution, as provided for by section 2159 of the
GARNISHMENT:
answer: issue. Compiled Laws of the territory, which reads as follows: “When any execution shall be placed in the hands of any officer for collection he shall call upon the defendant for payment thereof, or to show him sufficient goods, chattels, effects, and lands whereof the same may be satisfied; and if the officer fail to find property sufficient to make the same he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court out of which said execution issued, and make true answers on oath concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees summoned in suits originating by attachments.” This section, as

well as that pertaining to attachment proceedings, was adopted substantially from the statutes of the state of Missouri by the legislature of the territory, and it is a well recognized principle that thereby the legislature adopted the judicial construction that had been given to it in that state at the time of its adoption. The supreme court of the United States says that this is a received canon of construction fully acquiesced in by that court; that, where English statutes—such, for instance, as the statute of frauds and the statutes of limitations—have been adopted into our own legislation, the known and settled construction of the statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority. *McDonald v. Hovey*, 110 U. S. 619; *Pennock v. Dialogue*, 2 Pet. 1. In Alabama it was held that the legislature in that state in adopting the Code must be presumed to have known the judicial construction which had been placed upon the former statutes, and therefore the re-enactment in the Code of the provisions substantially contained in former statutes was a legislative adoption of their known judicial construction. *Duramus v. Harrison*, 26 Ala. 326. In applying this rule to the statute in question, we must presume that it was adopted by the legislature in view of the judicial construction it had received prior to its adoption by the supreme court of Missouri, and in referring to the rulings of that court upon the statute in question we find, in *Van Winkle and Randall v. McKee*, it was held “that a deed of assignment void as to creditors did not create the relation of debtor and creditor between the grantor in the assignment and the assignee. The validity of the assignment can not be tried in a court of law upon an issue made between a judgment creditor and the assignee garnished on an execution under the provisions of the act in question.” *Van Winkle et al. v. McKee*, 7 Mo. 435. In *Lee et al.*

v. Tabor, Garnishee, 8 Mo. 233, it was held: "In a proceeding of garnishment under attachment such an issue could be made and tried,"—but in referring to the case of Van Winkle et al. v. McKee, supra, the court said: "That case arose on construction of the statute giving plaintiff in execution a right to garnishee the debtors of the defendant. The reasoning of the court in that case would certainly apply to this; and, were the phraseology of the statute concerning attachments as circumscribed as that in relation to executions, we would feel no hesitation in pronouncing a like judgment." Under the execution law a garnishment is given against the debtors of the defendant in the execution. The statute concerning attachments gives an original writ against the lands, tenements, goods, moneys, effects, and credits of the debtor, in whosoever hands they may be, and directs that all persons shall be summoned as garnishees who are named as such in the writ, and such others as the officer shall find in possession of moneys, goods, or effects of the defendant; but no such provisions are made for garnishment under execution. In the case of Wood v. Edgar, 13 Mo. p. 451, the court briefly, yet explicitly, sets forth what this court believes to be the correct construction of the statute. Wood had recovered judgment against Collins & Workman for \$1,273, and garnished Edgar. Edgar answered that he held in his hands \$1,000, in American gold, deposited by Collins & Workman, to be used by him in compounding with the creditors of Collins & Workman. The court, in passing upon the case, said: "We concur in this case in the construction which the circuit court gave to the sixth section of our act concerning executions. We do not understand that under this section a person having possession of property of the defendant in the execution can be garnished. That section is confined to debtors of the defendant,

and in this respect is more limited in its operation than the corresponding section of the attachment law. No necessity is perceived for giving this statute a more enlarged construction. Gold and silver coin are subject to be seized on execution, like any other property not exempted by law; and the same vigilance which enables the creditor to garnishee the person in whose possession it happens to be found would enable him to levy directly upon the money. So, also, it could be reached by attachment, if the case in other respects authorized one. If the garnishee in this case had been the depositary of a horse or other chattel than the gold coin belonging to the defendant, it could hardly admit an argument that such a depositor was not a debtor of the defendant within the meaning of the act. The principle is not changed by the fact that the property was current gold coin, since an execution reaches that under our law. The only question is, was Edgar, the garnishee, a debtor of Collins, the defendant? He had received from Collins \$1,000 in American gold, with directions as to the disposition of it. He was in no sense a debtor to Collins." Nor is a factor having in his possession goods consigned for sale a debtor, within the meaning of the statute. *Pratte v. Scott*, 19 Mo. 625. In a garnishment under an execution it was held by the court: "In order that an indebtedness may be liable to garnishment, it must be shown to be absolutely due, as a money demand unaffected by liens or prior incumbrance or condition of contract." *Scales v. Southern Hotel Co.*, 37 Mo. 520; *Neil v. Tyler*, 38 Mo. 545, 43 Mo. 581. The above cases clearly indicate the construction that was given to the statute by the supreme court of that state, and their rulings upon it appear to have been uniform, until the statute itself was changed by legislation on adoption of the Code, in 1855, and, outside of the fact that we may regard them authoritative upon us under

the rule before given, we do not see why the construction they put upon it should not be accepted by us as the correct one. This kind of garnishment is a proceeding relating to process. It is one of the modes pointed out by the statute by which an execution may be executed. It is not a new suit, but an incident or auxiliary of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's creditors. *Tinsley v. Savage*, 50 Mo. 141. The statute is in derogation of the common law, and, therefore, to be strictly construed, and its provision can not be extended by construction. *Ford v. Dry-Dock Co.*, 50 Mich. 358, 15 N. W. Rep. 509. The only authority for the proceeding is that directly conferred by statute which in terms provides that if the officer fails to find property to satisfy the execution he shall notify persons indebted to the defendant not to pay said defendant, but to appear in the court out of which the execution was issued and make true answers concerning his indebtedness. The only thing he is to answer to is indebtedness to the execution defendant. The only issue authorized by the statute to be tried is his indebtedness to the execution defendant. And this brings it directly under the general rule that in garnishment proceedings recovery can be had only upon such claims as the principal debtor might himself enforce by action at law in his own name. *Patton v. Smith*, 7 Ired. 348; *Webster v. Steele*, 75 Ill. 546; *May v. Baker*, 15 Ill. 90; *Swann v. Summers*, 19 W. Va. 115; *Hoyt v. Swift*, 13 Vt. 133; *Brigden v. Gill*, 16 Mass. 522; *Hassie v. God is With Us*, 35 Cal. 385, 386; *Freem. Ex'ns*, sec. 162; 2 *Wade Attachm.*, sec. 448; *Goodde v. Barr*, 64 Wis. 662; *Adams v. Barrett*, 2 N. H. 375; *Piper v. Piper*, Id. 439.

The record shows that the jury returned the following verdict: "We, the jury, by the direction of the court, find that the answer of the garnishee is not

true, and that the said garnishee has property in his hands belonging to the defendant, Jesus M. Perea, equal to the amount of and sufficient to pay the plaintiff's execution." The verdict does not find the matter of indebtedness—the real question in issue—one way or the other, and is not a verdict upon the issues authorized by statute or made by the pleadings; and in such cases, says the supreme court of the United States: "The rule of law is precise upon this point. A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious. It results from the nature and the end of the pleadings. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to the court or to the appellate court that the finding is different from the issue, or is confined to a part only of the issue, no judgment can be rendered on the verdict." In this case the finding is different from the issue, and, though in the nature of a special finding, does not find the fact authorized by the statute to be tried, and comes directly within the rule thus laid down by the supreme court. *Patterson v. U. S.*, 2 Wheat. 222.

It is contended that, the bill of exceptions not having been signed and settled by the judge, we are to presume the evidence sustains the findings of the court, but there is evidence in the record, without reference to the bill of exceptions, that we must consider,—that is, the answer of the garnishee, which is to be taken as true until denied, and stands as evidence for him until overcome by evidence on the part of the plaintiff. This proposition is fully sustained by the following authorities: *Davis v. Knapp*, 9 Mo. 657; *McVey v. Lane*, Id. 48; *Pearless*

BURDEN of
proof: verdict.

v. Porter, 12 Mo. 76; Stevens v. Gwathmey, 9 Mo. 636. In Holton v. So. Pacific Railroad Co., it is held that the answer of a garnishee makes a prima facie case for him, and, whether it be a denial or an affirmation of new matter, it must stand until overthrown by evidence on the part of the plaintiff. Holton v. So. Pacific Railroad Co., Garnishee, 50 Mo. 151.

Therefore the facts set forth in the answer of the garnishee that he was not indebted to the defendant, that he had no property in his possession belonging to him, and that the property in question had been purchased by him from the defendant, and paid for, long prior to the issuing and service of the notice of garnishee, and that the same was not done for the purpose of defrauding the creditors of the defendant, being prima facie facts in evidence on behalf of the garnishee, it would throw the burden of overcoming this evidence on the part of the plaintiff; and the court, in taking the case from the jury, in order to render the judgment he did, would have to find as a matter of fact that the answer was untrue, and that the transaction was fraudulent; that there was property in the possession of the garnishee belonging to the execution defendant; that it was subject to execution under the law, and that its value was at least the amount of the judgment—each of which would be a controverted question of fact which the court, under the ruling of the supreme court of the United States, is bound to submit to the jury under proper instructions. Barney v. Schomeider, 19 Wall. 248; Hodges Easton, 106 U. S. 408.

It is also contended by counsel for defendant in error that, while the recourse as a general rule is limited by the extent of the garnishee's liability to the defendant's debtor, this is not true where the garnishee is in possession of the effects of the defendant under a fraudulent transfer from the latter. That, as a propo-

sition of law, is correct if the garnishment was under an attachment proceeding, as we have before noticed, but if we could give the proceeding in this case the full scope and power of an attachment proceeding, as is contended for on half of the defendants in error, and could consider the question of the transfer of the property of the defendant to the garnishee for the purpose of defrauding, hindering, and delaying the creditors of the defendant, as a proper issue to be tried and determined under the proceedings in this case, there would still remain for us to determine the question as to the power and authority of the court in taking the case from the jury and directing a verdict, and the sufficiency of the verdict to authorize the judgment. In the supreme court of the United States it has been held: "Where matters alleged to have been fraudulent are being investigated in a court of law it is the province of the jury to find the facts under the instructions of the court." *Gregg v. Sayre*, 8 Pet. 252. And again the same court says: "It would seem to be difficult on principle to maintain that the possession of goods sold is per se fraud, to be so pronounced by the court; as that cuts off all explanation of the transaction which may have been entirely unexceptionable. If circumstances at law may be proven to rebut the presumption of fraud, the case must be submitted to the jury." In concluding the opinion, says Justice McLEAN: "Few questions at law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been in England and the United States to consider the question of fraud a fact for the jury under the instructions of the court, and the weight of authority seems to be now in this country favorable to this proposition." *Warner v. Norton*, 20 How. 448. And it has thus been held in some of the states that the jury must be permitted to consider and draw their

own inferences from badges of fraud, and the court should not interfere to formulate conclusions for them. *Leasure v. Coburn*, 57 Ind. 274; *Herkelrath v. Stookey*, 63 Ill. 436; *King v. Russell*, 40 Tex. 133; *Waite Fraud. Conv.*, sec. 226.

When fraudulent intent is not apparent on the face of the deed, it is a question of fact for the jury, and the court has not the power to infer the intent. Thus the question of fraudulent intent is almost uniformly submitted to a jury, and it is regarded as an error for the court to interfere with the province of the jury in this particular. *Id.*, sec. 204. *Peck v. Crouse*, 46 Barb. 151; *Monteith v. Box*, 4 Neb. 171; *Vance v. Phillips*, 6 Hill, 433; *Hobbs v. Davis*, 50 Ga. 214; *Murray v. Burtis*, 15 Wend. 214; *Syracuse Chilled Plow Co. v. Wing*, 85 N. Y. 426; *Van Bibber v. Mathis*, 52 Tex. 409; *Winchester v. Charter*, 102 Mass. 272; *Penser v. Peticolas*, 50 Tex. 638; *Wessels v. Beeman & Tann*, 66 Mich. 343.

The last case cited is directly in point. The plaintiff sued defendants for alleged unlawful conversion of certain tobacco and unstamped cigars and other property seized on an execution at the suit of a judgment creditor of his vendor, which sale was attacked as fraudulent in fact as to creditors, etc. The bill of exceptions, not being in proper form, was not regarded as a part of the record, or read or considered by the supreme court; but the circuit judge charged the jury as follows: "I think the sales from Aaron Wessels to Wm. E. Wessels must be regarded as void under all the testimony, as I view it. Gentlemen of the jury, I do not think the entry upon the books referred to by counsel for the plaintiff affords the proof she claims, by showing that the United States government consented to the sale from Aaron Wessels to William Wessels. The sale, as shown by the testimony in the case, is void, and the plaintiffs received no title

thereby. The property either belonged to Aaron Wessels or to the general government, and the plaintiff can not maintain this action. You will, therefore, render a verdict in favor of the defendant and against the plaintiff." The supreme court held this instruction to be error, and says: "Whether the sale from Aaron Wessels to William E. Wessels was fraudulent as to creditors was a question of fact, and should have been submitted to the jury under proper instructions." Counsel for the defendant insisted that the sale was void as a matter of law, because there was no delivery, and the sale was not followed by an actual and continued change of possession, but the court held that delivery and possession appeared, though imperfectly, as a controverted question of fact and should have been submitted to the jury, and that a new trial for that reason must be granted. In that case, as in this, the evidence was not in the record, yet the court held that the question of the sale from Aaron Wessels to William Wessels, although imperfectly, appeared as a controverted question of fact, that should have been submitted to the jury. In this case the same question appears, but not imperfectly. The answer of the garnishee denies the indebtedness and the fraudulent purchase of the property, and avers that the same was purchased from the defendant by him, and fully paid for, before the garnishment proceeding was issued; and this answer has the effect of, and stands as, evidence on his behalf until overcome by evidence on the part of the plaintiff. Therefore, for the purpose of this question, it is immaterial what the testimony of the plaintiff might have been. It would still be a controverted question of fact, even if the testimony on the part of the plaintiff was overwhelming, and showed the answer of the garnishee to be untrue in every particular; it would only be a conflict in evidence, and show that there was a discrep-

ancy in the testimony. The supreme court of the United States in *Barney v. Schomeider*, 9 Wall. 253, holds: "Where there is any discrepancy, however slight, the court must submit the matter to which it relates to the jury, because it is their province to weigh and balance the testimony, and not the court's."

In endeavoring to apply the statute in question to the proceeding and verdict in this case, it becomes very apparent that the legislature did not design it a remedy to try the right of property under, and to determine the fraudulent transfers of property between the parties. How is the court to determine whether the judgment should go or execution should issue against the garnishee for goods and chattels of the execution defendant claimed in a general charge to be in his possession? In other forms of actions the pleadings make a direct issue as to the specific property in question. In a proceeding in garnishment under an attachment where the right of the garnishee is protected by an indemnity bond, if property is found in his hands, its value has to be assessed before judgment can be given against the garnishee; and that would be a question for the jury, and they would have to make a finding upon it before the liability of the garnishee would incur in this case, where the record contains no description of the property by which it is capable of identification. The court must necessarily be in the dark as to what property the garnishee would be chargeable with; and the findings in this case do not throw any light on the question whatever, but they do show how inadequate the provisions of the statute (to give the construction contended for) would be to protect the rights of parties in proceedings under it. In *Bethel v. Linn*, 63 Mich. 464, in a proceeding which the legislature unquestionably designed for the trial of issues of that kind the same question arose, and the court, in order to sustain the act, says: "It is the duty of the court to sustain the law and pre-

serve the remedy designed by the legislature, if there appears to be any way in which these statutes can be carried out and made effectual, and thinks the difficulty can be avoided by requiring special verdicts to be returned by the jury, embodying the property in the garnishee's hands for which they adjudged him liable; and suggest the following questions to be submitted to the jury in such cases: 'What property do you find to have been in possession or under the control of the defendant at the time of the service of the writ of garnishment upon him for which, under the evidence and the law as given by the court, he is liable as garnishee? What do you find the value of such property to be under the testimony and the law as given to you by the court?'" The facts which the court in the above case required to be specially found by the jury in order to give effect to the statute would be equally applicable in this case. All the facts which the court directed the jury to return in the case under consideration might have been true, and yet there might not have been any liability on the part of the garnishee. He might have in his possession property belonging to the defendant, and yet that property might be mortgaged to its full value, or it may have come into his possession by accident, or without his knowledge or consent. In either event the fact found would be true, and yet, as it has often been held under such circumstances, no liability would attach to the garnishee. There may have been evidence from which the jury could have found indebtedness on the part of the garnishee to the defendant arising from a fraudulent transfer of property, but they did not find it, and the court, independently of the verdict, could not find it. It was impossible, therefore, that a judgment could be pronounced for the plaintiff upon the verdict as directed, and the court could not, consistently with the constitutional right of a trial by jury, direct the

jury to return a part of the facts, and itself determine the remainder, without a waiver on the part of the defendant of a verdict by a jury. *Hodges v. Easton*, 106 U. S. 408. As we find error upon the face of the record that requires us to grant a new trial, we do not consider the question as to the bill of exceptions. The cause is reversed and remanded for a new trial.

O'BRIEN, C. J., and SEEDS and McFIE, JJ.,
concur.

[No. 390. July 24, 1891.]

PETER TRAMBLEY AND ERNESTINE TRAM-
BLEY, APPELLEES, v. GEORGE LUTERMAN,
APPELLANT.

WATER RIGHT—PRESCRIPTION—EASEMENT.—The adverse, continuous, uninterrupted use, for a period of twenty-one years, for milling purposes, of the water of an artificial ditch or acequia, supplied from a nonnavigable stream, with the knowledge and acquiescence of the owners of the adjoining land over which the water flowed, is sufficient to establish an easement, in the absence of any evidence of permission or license; and a subsequent purchaser of and locator on such land takes subject to such easement, having only a qualified right to the use of so much of the water as will not deprive the prior proprietor and locator of sufficient to operate his mill.

APPEAL, from a judgment for complainants, from the Fourth Judicial District Court, San Miguel County. Judgment affirmed.

The facts are stated in the opinion of the court.

J. D. O'BRYAN for appellant.

LEE & FORT for appellees.

O'BRIEN, C. J.—This suit was brought by Peter and Ernestine Trambley for the purpose of restraining appellant, the defendant in the court below, from diverting the waters out of the artificial race or ditch

of appellees situate on the Gallinas river, near Las Vegas, in San Miguel county, to a wool and pelt cleaning establishment of the defendant, thereby depriving complainants of enough of water with which to operate their mill. It appears from the record that in 1849, Rafael Garcia erected a grist mill on the Gallinas river at the town of Las Vegas, San Miguel county. The machinery of the mill was propelled by water taken from an artificial ditch or acequia supplied from the river. In 1859, becoming the owner of this property, he erected a new mill thereon, and continued to own and operate the same till October, 1864, when he sold it to Juan Francisco Pinard, who used it until May, 1867, when he conveyed it to complainants, who thereupon went into possession and used the same without interference until the summer of 1886, when defendant, Luterman, erected a wool and pelt cleaning establishment; that plaintiffs, on account of such diversion of the water from the ditch, are deprived of a supply sufficient to operate their mill; and commenced this suit for relief, praying in their bill that the defendant be restrained from diverting, taking out, or interfering with the water in the ditch or acequia. Defendant's answer to the bill sets up various grounds of defense. The principal ones relied upon, deemed necessary to be considered in determining the case are: (1) That complainant's have shown no exclusive right to the use of the water from the acequia, either by grant or prescription; (2) if such right ever existed, it was lost by failure of complainants, and of those through whom they claim, to comply with the conditions expressly imposed, or by repeated changes made by complainants as to the manner of appropriating the water; (3) that complainants have no right thereto by use or adverse possession; and (4) that complainants are estopped by their "words, acts, and silence," from denying the defendant's right to appropriate enough

of the water from the acequia to operate his wool cleansing establishment. The action was tried before a master, who filed substantially the following findings of fact: “(1) That, prior to the year 1846, the owners of the land on the east side of the Gallinas river, opposite the town of Las Vegas, had constructed an irrigating ditch, the head of the ditch being north of the town, and the supply of water taken from the river; that, after the construction of the ditch, one Rafael Garcia, who owned the land under the ditch, applied to his co-owners of the land along the ditch for the privilege of using the water, not necessary for irrigation, flowing in the ditch, to drive a flour mill he was about to erect, and that, in accordance with such application, a number of the owners of land along the ditch, and claiming to represent all the owners of the land, gave to Garcia an instrument in writing, of which the following is a translation:

“ ‘In this place of Las Vegas, the twelfth day of the month of May, of the year 1846, before me, citizen Manuel Duran, justice of the peace of this district, appeared in their own proper persons citizens Jose Gonzales, Juan Jose Martin, Guadalupe Baca, invited also by the citizen Rafael Garcia, whom I certify to know, and the first named say for themselves and in the name of other persons, owners of the acequia which waters the tillable land on the other side; and whereas, Garcia has solicited permission to erect a mill on said acequia, obligating himself to maintain the dam and trench in good order, and furnish to peones for cleaning the same; only conceding the good will and consent of all the others who are concerned in the before mentioned acequia, with the condition that the announced mill does not interfere with the irrigation of the land, and grind, only when it does not impede irrigation by anybody; and in order that Garcia may remain secure

and as provided for his mill he solicited their free consent, and giving herewith Garcia power that if, at any time hereafter, any person should make any infringement that they should be debarred, by this deed, to do so; that now or hereafter, in this place above or below, another mill nor any other manufactory should be placed; and, if placed, it should not be permitted, it being the will of the undersigned that said Garcia shall enjoy alone the benefit and grace of the will of the undersigned, having solicited me, the said justice, to execute these presents, and to authorize the same with the power which is conferred upon me by right and by law. Signing with the undersigned and those of my assistants, which I hereby do on account of not having a clerk, and none being in this department, on common paper, on this, the twelfth day of May, 1846.

(Signed)

“ ‘MANUEL DURAN.

“ ‘JOSE GONZALES.

“ ‘JUAN JOSE MARTIN.

“ ‘JOSE GUADALUPE BACA.

“ ‘Assistants: JESUS GALLEGOS, and

“ ‘ANTONIO MA. GONZALES.

“ ‘Recorded book 1, pages 195 and 196, Records of San Miguel county.’

“(2) That Garcia sometime between the years 1846 and 1848 built a small Mexican mill on the ditch or acequia, and used the waters therefrom for the purpose of running his mill, subject, however, to the right of the adjoining occupants to appropriate water therefrom for domestic and irrigating purposes. That Garcia died in the year 1855, leaving as his only heir Agapito Garcia, who shortly afterward, about the year 1856, sold the mill and the land whereon it stood to Merritt and Kihlberg, from whom, through several mesne conveyances, the property came into the hands of complainants on the tenth day of May, 1867. That the original mill built by Rafael Garcia was run contin-

uously by the water from the ditch up to the year 1860, when it was rebuilt to its present size by Miguel Desmarais, the owner at that time. That the mill, as rebuilt, has been continuously run by water taken from the ditch to the present time, except for a short period, when steam power was introduced to help out the water power. (3) That complainants have been the owners of the mill and land whereon situated for the past twenty years, and have operated the mill during that time, repairing the dam in connection with the other owners of the land along the ditch, keeping the ditch in repair, and having the use of all the surplus water of the ditch during that period, not used for irrigation or domestic purposes by the other owners of the land. That complainants derived their paper title to the land and appurtenances through six successive and regular deeds of conveyance, all duly recorded, beginning with one dated May 13, 1856, from Garcia and wife to Merritt and Kihlberg, and ending with one bearing date May 10, 1867, from Juan Francisco Pinard to complainants, Peter Trambley and Ernestine, his wife. (4) That when the mill is running the water appropriated from the acequia to operate the same, after passing over the mill wheel, returns by a sluiceway to the river below the mill. (5) That on the ——— day of ———, 1886, the defendant, George Luterman, bought a piece of land situate between the ditch which supplies complainants' mill and the Gallinas river, and five or six hundred yards above the mill, for the purpose of erecting a 'wool pulling and cleaning establishment;' that defendant had inquired of complainants before buying as to where he could find a convenient location for such an establishment, and that complainants had directed him to the place now occupied by defendant, and they had also inquired of them how much water he would use, and he informed complainants that he would use six inches square of water, to which information

plaintiffs made no response. (6) That defendant erected a building, involving considerable expense and outlay, by the end of June, 1886, at which time he constructed a flume from the ditch which supplies the mill, but on his own land, and diverted from that ditch, by means of boards placed across it, sufficient water for his use, which water is let into the flume through an aperture nine inches wide and three inches high; and that the defendant has since used from the ditch the quantity of water passing through the aperture or flood gate two or three days each week, during the months from December until March, starting his cleansing or washing operations from 10:30 A. M., and continuing until 4:30 P. M., or even later. (7) That defendant, during the time that he has conducted such establishment, assisted plaintiffs at their written request in rebuilding the dam in the river where the ditch receives its supply of water, as well as in repairing the ditch; that defendant has title to the land which he occupies under divers deeds of conveyance duly recorded running from May 24, 1882, to April 24, 1886, when one Ben Bruhn, the last grantee, conveyed the premises to the defendant; and that, in addition thereto, the latter obtained from several owners of the land along the acequia the following agreement or license for the use of the water: 'Know all men by these presents, that we, the owners of land along the acequia in East Las Vegas, in consideration that George Luteman has erected a wool cleaning establishment on his land also fronting on said acequia, and that he will continue the said establishment, do hereby give our consent that he may use the water from said acequia at such times as we do not require the same, for the purposes of his establishment; but this permission on our part shall never be construed into a right in the said George Luteman to the use of the said water against our wishes, and for any longer time than it is our pleasure to permit the

same. Witness our hands, etc., this first day of April,
A. D. 1887.

LORENZO LOPEZ,
“ ‘ANICETO BACA,
“ ‘S. P. CLEMENTS,
“ ‘B. PAPAN.’

“(8) That the defendant's establishment is built some distance from the acequia towards the river, and the water he uses passes out of his establishment after the use, and wastes into the river. That during the time of low water in the river, and during the hours that defendant is using the water for his establishment, the plaintiffs suffer loss from the use of the water by the defendant for his establishment, a loss which is measured by about one fourth of the capacity of the mill for grinding. This loss, however, does not occur during the rainy season, or at such other times when there is plenty of water in the river. From which findings the master drew the following conclusions of law: ‘(1) That the original writing given by the landowners to Rafael Garcia, the proprietor of the mill first built, if not a grant in terms to him of an easement in the water of the ditch, to use for driving his flour mill, against all persons, except for irrigation and domestic purposes, was at least an executed license after the erection of the mill, and by the long use of the water by Garcia and his assignees and privies in estate became irrevocable, and an easement appurtenant to the mill. The erection of a new mill by Desmarais in the place of the old one built by Garcia on the same land, and the use of the water in the same ditch, in the same way and for the same purpose, would not destroy this right; but the twenty-six years' use by plaintiffs and their immediate grantors, Pinard and Desmarais, would only strengthen it, and of itself be sufficient to create such an easement in plaintiffs. (2) I conclude, in regard to the question of estoppel, that the construction of the wool washing establishment on defendant's

own land, in sight of plaintiffs, and a general knowledge of the purpose for which the building was being constructed by the defendant, without active opposition from plaintiffs, would hardly work an estoppel against plaintiffs, at least unless it appeared that plaintiffs knew especially how the water was to be used and disposed of after use by the defendant, and the manner in which it might affect their water power, and acquiesce in it. (3) That the diversion of the water from the said ditch by the defendant, to the damage of plaintiffs, and allowing the water to waste into the river, for any other purpose than the ordinary irrigation of his land and domestic purposes, is such an infringement of plaintiffs' rights as to entitle them to a restraining order of the court, enjoining defendant from using the water during the seasons of low water in the river for washing wool or other manufacturing purposes, unless the water so used is returned to the ditch above plaintiffs' mill, and without serious diminution in quantity." Counsel for appellant presented objections and exceptions to the report, all of which were overruled. The court thereupon confirmed the report, and entered a decree in favor of complainants in substantial conformity with the master's decision, from which the defendant has taken this appeal.

The substance of the errors relied upon by appellant to secure a reversal may be briefly stated as follows: The court below erred in overruling defendant's exceptions to the findings and decision of the master, and in entering judgment in accordance with the master's report, (1) because the deed from Agapito Garcia does not convey any right to the use of the water in the acequia, nor do any of the subsequent deeds do so until 1864, when Desmarais conveyed to Pinard; (2) that it was error to find, if there had been no easement, that there was an executed license; (3) in failing to find that on the removal of the little Mexican mill in 1860,

and the substitution of a distillery therefor the license, if any, expired, and did not revive in favor of Desmarais when he built the new mill; (4) in failing to find that Martin, who executed the license to Garcia in 1846, had previous to 1838 sold the property, of which the land of the defendant is a part, to one Romero, and that at the time the Garcia license was granted the present mill site of the defendant belonged to the Romero heirs. The other assignments are of a similar nature, all charging error in failing to find such facts as in appellant's opinion tended to show that complainants had no exclusive right to appropriate the waters from the ditch for the use of their mill. Upon a careful examination of all the testimony in the cause we are unable to discover any errors prejudicial to defendant's rights, either in the findings or in the refusals to find. They appear to us satisfactory and complete, fully warranted by the evidence, and cover all the issues involved in the pleadings. That additional findings, at least in part, might have been made, we concede, but they would be redundant, rather than material, and could not change the result. The ditch or acequia in controversy was made in the year 1846, before the acquisition of the territory by the United States. The rights of the parties to the use of the waters therein then attached according to the laws, customs, and usages in force in the republic of Mexico. It is apparent that when defendant bought his mill site in 1886 the Trambleys personally, and by their predecessors through whom they claimed title and took possession, had occupied and used the premises continuously during forty years for substantially the same purposes for which they were used when this suit was commenced; hence, when defendant purchased he knew or might have known of the existence of this servitude upon the land which he bought. His grantors, the Romeros, were present, and were well aware

that complainants and their predecessors had enjoyed this easement unchallenged for almost double twenty years. No objection had been made; no license had ever been requested from the Romeros. This is sufficient to create an easement. "There need be no claim of right in words, or an admission by the owners of the land in words, that he knew of the adverse cause and claim of right. Twenty-one years of adverse use continually and uninterruptedly, with the knowledge and acquiescence of the owner of the land, in the absence of any evidence of permission or license, is sufficient proof of the existence of such easement." *Blake v. Everett*, 1 Allen, 348. When defendant in 1886 bought the premises on which he afterward erected his wool cleansing establishment, he bought the same subject to complainants' easement,—a burden upon his estate as valid and effectual as if evidenced by a recorded incumbrance in writing. *Blake v. Everett*, supra. In this view of the case it is not important that Juan Jose Martin did not in 1846 own the land now owned by the defendant. The reason is obvious. It is true at common law the right of every riparian proprietor to the use of the stream is an incident to the ownership of the lands bordering upon the stream, and arises *ex jure naturæ*. "The right exists whether defendants exercised it or not, and the riparian proprietor may begin to exercise it when he will. It does not depend upon occupancy, and is not limited by the prior occupation of others, not amounting to an adverse enjoyment by prescription; but the rights of the different proprietors being equal, and each being entitled to the use of the stream for any lawful purpose, it is wholly immaterial who was first in time." Gould Waters, sec. 286.

But, says BIGELOW, C. J., in *Fuller v. Chicopee Manufacturing Co.*, 16 Gray, 43, 44: "To the extent to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose

of carrying mills, the right of other owners on the same stream who have not improved their sites for the creation of water power, and driving of mills, is abridged and taken away. In such case, prior occupancy gives prior title. Although the right to the use of the water is inherent in, or appurtenant to, land, it is, nevertheless, in a certain sense, a right *publici juris*, and subject to the rule of law which regards the erection of a dam for the purposes of creating mill power a profitable, beneficial, and reasonable use of the stream, of which riparian proprietors on the same stream, who have not appropriated the force and fall of the water on their own land, can not complain." "The right thus to appropriate water exists without private ownership in the soil, as against all persons, but the government, or its grantees, possession of public land which has not been surveyed, or patented, gives rise to no riparian rights in the streams which flow through it." Gould Waters, section 230; *Lake v. Tolles*, 8 Nev. 285. But common law, as to rights of riparian owners, is not in force in this territory, nor in California, Nevada, and other Pacific states. Gould, *supra*, section 228; Acts N. M. July 20, 1851; Jan. 7, 1852; *Kidd v. Laird*, 15 Cal. 161; *Butte T. M. Co. v. Morgan*, 19 Cal. 609. "The reasons," says SANDERSON, C. J., "which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called to apply them are changed, and not the rules themselves. The maxim, *sic utere tuo ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel, *ubi currere solebat*, without diminu-

tion or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses; but this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel, but more frequently necessitates such diversion, and moreover, does not require the water in a pure state in order to insure its reasonable and beneficial use. Yet the maxim above mentioned, upon which the rule is founded, is equally as applicable to the ditch owner and the miner as to the riparian proprietor, and neither can so use the water as to injure and prejudice the prior rights of a like use by the other." *Hill v. Smith*, 27 Cal. 476, 482. Besides, it is well recognized that even at common law the party who has used water for a special purpose, and in a particular manner, adversely and uninterruptedly for twenty-one years, may not be disturbed in such use by a subsequent locator. *Williams v. Nelson*, 23 Pick. 141; *Stein v. Burden*, 24 Ala. 130; *Townsend v. McDonald*, 12 N. Y. 38. The law of estoppel invoked by appellant is not applicable. Complainants do not deny to the defendant the qualified right to appropriate water from the ditch to enable him to carry on his business. They simply deny him the right to take it in such quantities as to deprive them of enough to operate their mill. They admit his right subordinate to their prior right. When they saw him, in 1886, build his establishment, and knew that he would require some of the water from the ditch for the use of the same, they did not know and were not informed that the defendant would require enough for his use to interfere with the successful running of their mill. They were not bound to object, and their failure to do so does not deprive them of their remedy. *Lux v.*

Higgin, 69 Cal. 266. The other objections urged by appellant are equally untenable. He insists, for instance, that, if the original license created an easement, it has been lost by repeated changes. But complainants do not ground their right to the use of enough of the water from the ditch to carry on their mill upon the so-called license to Garcia, but upon title acquired by long continued adverse use. "And when water has been lawfully appropriated the priority thereby required is not lost by changing the use to which it was applied. If the original appropriation was for a sawmill, the water may be used for a gristmill subsequently erected." *Maeris v. Bicknell*, 7 Cal. 261; *Hill v. Smith*, 27 Cal. 476; *McDonald v. Bear River Co.*, 13 Cal. 220. We have carefully examined the other points contained in the brief of the learned counsel for appellant, but fail to notice any not sufficiently answered in what we have already said. Finding no material error in the record, the judgment appealed from will be affirmed.

SEEDS and McFIE, JJ., concur.

LEE, J., having been of counsel in the case in the court below, took no part in this case in this court.

[No. 409. July 24, 1891.]

CHARLES H. GILDERSLEEVE, PLAINTIFF IN
ERROR, v. THE NEW MEXICO MINING COM-
PANY ET AL., DEFENDANTS IN ERROR.

MEXICAN GRANT—ADVERSE POSSESSION—LIMITATION.—In a suit for the possession of land granted by the Mexican government prior to the cession, and claimed by plaintiff under a title derived through the collateral heirs of the original grantee, who it was alleged had died intestate in 1848, where neither the plaintiff nor any of those through whom he claimed had ever been in possession of the land since that time, and defendant had maintained an open, adverse, continuous

possession of the same under claim of title in fee to the whole thereof through the grant and act of confirmation, for more than ten years before the bringing of the action, such possession was a bar to plaintiff's right of recovery, under section 1880, Compiled Laws, 1884.

ID.—WILL—ATTESTATION—VALIDITY.—A written will executed before an alcalde or judge of the first instance, and attested by two witnesses, in New Mexico, while a part of the government of Mexico, according to a custom which had obtained for at least one hundred years and been recognized as having the force of law, though not in accordance with the Mexican law requiring such wills to be executed before a notary and attested by seven witnesses, is valid *ex necessitate rei*; the Mexican government never having provided the dependency of New Mexico with such an officer before whom wills could be executed according to law.

ERROR, from a judgment in favor of defendants, to the First Judicial District Court, Santa Fe county. Judgment affirmed.

The facts are stated in the opinion of the court.

H. L. WARREN, THOMAS SMITH, GEO. C. PRESTON, and E. A. FISKE for plaintiff in error.

W. T. THORNTON and E. L. BARTLETT for defendants in error.

All of the customs, usages, and laws of Mexico which were in existence at the time of the treaty of cession, and which were not contrary to the spirit of our government, continued and remained in force. *Leitensdorfer v. Webb*, 20 How. (U. S.) 177.

In this instance they were so continued by express statute. Kearney's Code, sec. 1, p. 84, Comp. Laws, N. M.

The will in question was written by the alcalde and attested by him and two others, which, according to Velarde, was sufficient, in the absence of a notary and five resident witnesses, who could not be had. Law 1, tit. 18, book 10, Novissima Recopilacion.

The will was over thirty years of age, and like all ancient documents proves itself. 1 Greenleaf, sec. 21.

The testator was a soldier, enjoying the benefit of the *Fuero Militar*, and it was not required that his will should be in any particular form; it was sufficient to show it was his will. Schmidt's Civil Laws of Spain and Mexico, p. 218, art. 1029.

A will executed prior to the American occupation according to a custom then in existence, by which it might be executed in the presence of an *alcalde* or judge of the first instance, before two attesting witnesses where no notary could be had, is binding. *Adams v. Norris*, 23 How. (U. S.) 353, 363, 365; *Panaud v. Jones*, 1 Cal. 497, 505; *Von Schmidt v. Huntington*, 1 Cal. 55; *Castro v. Castro*, 6 Id. 158; *Lewis v. Pitcher*, 10 Id. 465; *Pino v. Hatch*, 1 N. M. 130.

"A person who enters into possession of land under a conveyance, although from a person having no title, is presumed to enter according to the description of the deed; and his occupancy of a part, claiming the whole, is construed as a possession of the entire tract." *Coleman v. Billing*, 89 Ill. 183; *Cruse v. Wilson*, 79 Ill. 233; *Hamilton v. Bag*, 63 Mo. 233; *Mason v. Ayers*, 73 Ill. 121; *McCarny v. Higdon*, 50 Ga. 629; *Nowlon v. Reynolds*, 25 Gratt. 137; *Barney v. Sutton*, 2 Watts (Penn.), 37; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 571; *Jackson v. Peter*, U. S. Cir. Ct. 467; *Thompson v. Gothen*, 9 Ohio, 170; *Jackson v. Hudson*, 3 Johns. (N. Y.) 384; *Cook v. Dodson*, 1 Tenn. 268; *Edgerton v. Bird*, 6 Wis. 527; *Van Cleve v. Milligan*, 13 Ind. 105; *Kilpatrick v. Siseros*, 23 Tex. 113; *Ware v. Johnson*, 55 Mo. 300; *Wilbourne v. Anderson*, 37 Miss. 155; *Bynum v. Thompson*, 3 Ired. (N. C.) 578; *Kyle v. Tubbs*, 23 Cal. 431.

As to what constitutes adverse possession, see *Wood on Lim.*, 503, 519, 520; *Andrews v. Mulford*, 1

Hayw. (N. C.) 311; McCarty v. Fancher, 12 Martin (La.), 300; Prevost v. Johnson, 9 Id. 123; Sepulvada v. Sepulvada, 29 Cal. 13; Paine v. Hutchinson, 49 Vt. 314; Miller v. Long Island R. R. Co., 71 N. Y. 380; Kennebec v. Springer, 4 Mass. 416; Slader v. Jefferson, 6 Cush. 129; Hale v. Gliddon, 10 N. H. 397; Washburn v. Cutter, 17 Minn. 361; Beatty v. Mason, 30 Md. 409; Carroll v. Gillion, 33 Ga. 539; Williams v. Wallace, 78 N. C. 354. See, also, Sule v. Barlow, 49 Vt. 329.

The possession must be accompanied with the claim of the fee, which together by construction of law is deemed *prima facie* evidence of such an estate. Wood on Lim., 514; Jackson v. Porter, 1 Paine, 457; Bartholomew v. Edwards, 1 Houst. Del. 17; Cooper v. Smith, S. & R. Penn. 26; Brown v. Gray, 3 Me. 126; Allen v. Holten, 20 Pick. 458; Betts v. Brown, 3 Mo. App. 20; McNamara v. Seaton, 92 Ill. 498; Skinner v. Crawford, 54 Iowa 119.

The action is barred by the statute of limitations, the full ten years required by statute having expired before its institution. Probst v. Trustees, etc., 129 U. S. 182, 190, 192.

If, after a cause is set for hearing, the bill is dismissed, either on plaintiff's own application or by reason of his default when the cause is called, such dismissal is equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter. Adams Eq. 373; Dan. Chy. Pld. 659; Cummings v. Bennett, 8 Paige, 79; Sears v. Jackson, 3 Stock. (N. J.) 45; Burnbly v. Stainton, 24 Ala. 712; Borrowscale v. Tuttle, 87 Mass. 337; Foot v. Gibbs et al., 67 Id. 412. See, also, Farish v. N. M. M. Co., 5 N. M.; Biglow v. Winsor, 67 Mass. 301; Pickett v. Loggan, 14 Ves. 232; Cooper's Eq. 270; French v. French, 8 Ohio; Durant v. Essex Co., 7 Wall. 109; Walden v. Bodley, 14 Pet. 156; Hughes v. United States, 4 Wall. 23; Hood v. Gibbs, 1 Gray, 412.

It is well settled that no other person than the person in the adverse possession of property claiming it as his own, at the time of its sale, can sell and transfer a good title. *Young v. Furgeson*, 1 Litt. 298; *Carnder v. Adams*, 12 Wend. 297.

The conveyance to Gildersleeve was void, not only because it was made when the grantor was out of possession, but because the consideration was illegal. *Burns v. Scott*, 117 U. S. 582-589, citing *Hilton v. Woods*, L. R. 4 Eq. 432, and *Bush v. Harper*, 66 Mo. 51.

No cross-bill can be filed in any proceeding in a court of equity without first obtaining the consent of the chancellor. *Bronson v. La Crosse R. R. Co.*, 2 Wall. 283.

Where a party comes into a proceeding voluntarily, as an intervenor, if the original complainants fail in their suit he also fails. *Elderkin v. Fitch*, 2 Car. (Ind.) 90; *Cockrell v. Warner*, 14 Ark. 346.

A cross-bill can only be filed when growing out of the subject-matter in the original bill, and where the complainants in the original bill are directly interested in the result of the subject-matter in legislation in the cross-bill. *Gallatian v. Irwin*, Hopk. (S. C.) 48; 8 Cow. 361; *May v. Armstrong*, 3 J. J. Marshall (Ky.) 262; *Dannell v. Morrison*, 6 Dana, 186; *Fletcher v. Wilson*, 1 S. & M. Chy. 376; *Draper v. Gordon*, 4 Sandf. C. R. 210; *Josey v. Rogers*, 13 Ga. 478; *Slason v. Wright*, 14 Ver. 208; *Rutland v. Paige*, 24 Id. 181; *Cross v. De Valle*, 1 Wal. (S. C.) 14; *Hurd v. Case*, 32 Ill. 45; *Underhill v. Van Cortland*, 2 Johns. C. R. 339-355; *Morgan v. Smith*, 11 Ill. 194; *Adams Eq.* 403; *Andrews v. Hobson*, 23 Ala. 219; *Andrews v. Kimball*, 12 Mich. 94; *Griffith v. Merrit*, 19 N. Y. 529; *Ayers v. Carver*, 17 How. (U. S.) 591; 3 Dan. Chy. Prac., sec. 1743.

O'BRIEN, C. J.—The subject-matter of the controversy involved in this suit is a tract of mining and pastoral land embracing about sixty-nine thousand, four hundred and fifty-eight acres, situate in Santa Fe county, known as the "Ortiz Mine Grant," conceded, in accordance with the laws of the republic of Mexico, in the year of 1833, to Jose Francisco Ortiz and Ignacio Cano. The latter, prior to his death, in 1836, conveyed to his cotenant, Ortiz, all his title and interest in the grant. It is not disputed that thereafter, in the year 1840 or 1841, Jose Francisco Ortiz and Dona Ines Montoya, his wife, jointly executed an instrument in writing, known as a "mutual will," of the tenor following:

"Third Stamp.

[Stamp.]

Two Reals.

"For the years of one thousand, eight hundred and forty and one thousand, eight hundred and forty-two. At the city of Santa Fe, capital of the department of New Mexico, on the fifteenth day of the month of August of one thousand, eight hundred and forty-one, before me, the citizen Albino Chacon, constitutional alcalde of the same, and by operation of law judge of the first instance, those of my attendance being present, with whom I act by special authority, appeared Don Jose Francisco Ortiz, a resident of the Real de Oro, and his living wife, Dona Maria Ines Montoya, both of whom I certify I know; and they together stated that whereas, God has not been pleased to give them from their marriage a child or forced heir living, they agree with each other that the one who shall survive the death of the other shall be the sole heir to everything that may be recognized as their property, in live stock, real estate, chattels, or in any other manner, without any relative of either of them preventing it, through any privileged right that he may allege; but in case that it should so happen, and that it should be attempted by any of them to institute

suit against the surviving party, the testators from this time request the national justices and in particular those who may have cognizance of this matter, that they be not heard either in or out of court, but rather they give authority to the judges in order that by all the rigor of law they may force and compel them to what is stipulated by this document, and to the guaranty thereof, as fully as if it were in definitive sentence pronounced in adjudicated cause, acquiesced in by them, and not appealed from. In witness and guaranty whereof they thus request me to authenticate it, which I do according to the provisions of law, with my attending witnesses; to which I certify.

“JOSE FRANCO ORTIZ.

“MARIA INES MONTOYA.

“[De Assa.]

“JOAQUIN YOMOJANO.

“JOSE ALBINO CHACON.

[De Assa.]

“FRANCO BACAY ORTIZ.”

Jose Franco Ortiz dying in 1848, in the possession of the land, his widow, Maria Ines Montoya, continued in possession till 1853, when she conveyed the same to one John Grenier, who held such title until August 19, 1854, when he conveyed the same to Charles E. Sherman and his associates; who in turn, on July 10, 1864, conveyed the same to the New Mexico Mining Company, which took immediate possession thereof, and it and its correspondents have since continued in the possession of the whole, or a portion thereof; that said Ortiz Grant, in 1861, was duly confirmed by an act of congress; and thereafter, on May 20, 1876, a patent therefor was duly issued to the New Mexico Mining Company. The patent contains among other exceptions, the following reservation or proviso: “The confirmation of this said claim and this patent shall

only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." Plaintiff in error asserts his deraignment of title to an undivided one fourth interest in the premises, as follows: Denying the validity of the "mutual will," hereinbefore set out, he claims that said Jose Francisco Ortiz died intestate in 1848, leaving no direct heirs; but that he left as "collateral heirs," an only sister, Maria de Luz Ortiz, and Abran, Estefan, Ramon, Esmerejildo, Prudencia, and Macedonia Ortiz, children of his deceased brother, Ignacio Ortiz; that said Maria de Luz, sister of Jose Francisco Ortiz, subsequently intermarried with one Manuel Sanchez, and that she died intestate, leaving five children surviving; that one of said children, Rosaria, married one Rafael Romero, and that she sometime thereafter died intestate, leaving one child as heir, a daughter, Josefa Romero, who afterward married Jesus Garcia. It appears in evidence, and is not seriously disputed, that all of the foregoing representatives of Jose Francisco Ortiz, to wit, the children of his brother Ignacio, and the children and grandchildren of his sister Maria, had conveyed, at different times before the commencement of this suit, all their estate in the property in controversy to Elias Brevoort, and that the latter on July 1, 1880, conveyed an undivided one half thereof to the plaintiff in error and one John H. Knaebel; that Knaebel, on July 7, 1886, reconveyed his interest therein to said Brevoort. The contention of the plaintiff in error is that said "mutual will" is not only false and fraudulent, but void for want of proper execution; and hence that the widow of said Jose Francisco Ortiz only took at his death an undivided one half of his realty; that said collateral heirs of Ortiz took the remaining moiety; and that through their several and

MEXICAN grant:
adverse posses-
sion: limitation.

other mesne conveyances to his grantor, Brevoort, he is entitled to an undivided one fourth interest in the whole of the grant. Under the pleadings, the issues presented were: First, whether the interest in the grant of which Ortiz was seized passed, at the time of his death, in 1848, by virtue of the mutual will, to his widow, and from her to the respondent, the New Mexico Mining Company, or whether it passed to the descendants of his brother and sister, and from them to the complainant, to the extent of the quantity claimed in his bill of complaint; and second, admitting that the interest of Ortiz descended to the heirs of his brother and sister, is not complainant barred of the relief sought by the statute of limitations?

The suit from its commencement, in January, 1883, to the twenty-sixth day of December, 1888, when the final decree dismissing the bill was entered, had undergone various mutations as to parties, pleading, reports, and rulings, and it would subserve no useful purpose to attempt to give a summary of such complicated changes. The case was submitted to a master, and complainants introduced proofs before him at divers times tending to support the allegations contained in his bill. Defendant introduced in evidence the mutual will, and proof tending to show that the same had been executed by Ortiz and wife, in the presence of the alcalde and two assisting witnesses, and that such was the usual manner of executing wills in New Mexico at the time this will was made, and for more than thirty years prior thereto. Defendant also introduced evidence tending to prove that, upon the death of Jose Francisco Ortiz, his widow, claiming under the will, took possession of the premises in question, and that she continued in such possession openly and notoriously until December, 1853, when she conveyed them; that her grantee entered into the possession thereof, and continued therein until they were con-

veyed to the New Mexico Mining Company, in 1864, when the latter entered into and has ever since continued in the actual possession thereof. There was also evidence tending to show that the respondent company and its grantees had worked and operated the mines upon said grant, built a large number of houses thereon, and kept tenants continually occupying said houses, built and operated two separate gold mills, and spent several hundred thousand dollars in the improvement of the property, and regularly paid the taxes thereon. Complainant offered no testimony in rebuttal of such proof. Testimony was also introduced tending to show that there never had been such an office as an escribano or notary within this territory, as appeared from the records of the surveyor general's office, and that such office was the repository of the ancient Mexican archives and of wills, deeds, and other written documents affecting real estate; that the custodian of such office had thoroughly examined all of the wills upon file, some of which went back for a period exceeding one hundred years, and that more than ninety per cent of them had been executed before an alcalde and two witnesses. The master, when the case was last heard, found in favor of the respondents upon the plea of the statute of limitations, and passed upon no other matter, except that he found the mutual will to be invalid. Upon the final hearing of the master's report, the court confirmed the same, and dismissed the bill, deciding that the will of Ortiz was valid and operative, and that the statute of limitations had run against complainant's cause of action. Complainant, by writ of error, brings such decree to this court for review.

The errors assigned by complainant to warrant a reversal of the judgment are seven in number. The two principal ones relied upon in argument are: First, error committed in the district court in holding and

decreeing that the bill of complaint and cause of action therein set out was and is barred by the statute of limitations, and in overruling plaintiff's exception to so much of the master's report as found in favor of the bar of the statute. Second, error committed by the court below in holding and decreeing that the "mutual will" offered in evidence by the defendant was a valid and legal will, and in sustaining the exceptions of the defendant in error to so much of the master's report as held that said will was inoperative and invalid.

It is not disputed that Jose Francisco Ortiz was in the actual possession of a portion of the grant at the time of his death in 1848, claiming the whole of it, and that he was succeeded in such possession by his widow, who continued therein until 1853, when her grantee, John Grenier, took and held such possession until he conveyed his estate therein to Sherman and others, who took and continued such possession until 1858, when they conveyed to the New Mexico Mining Company. The latter company and its associates appear to have taken immediate possession under the deed, and to have continued to use and occupy, at least portions thereof, to the present time. Complainant does not claim possession for himself, nor in behalf of any of his grantors, since the death of Ortiz, in 1848. His proof shows that strangers, at different times, had entered and used certain portions of the grant, but in no way connects his claim of title with any real or supposed rights accruing to such occupants by virtue of such possession. The boundaries of the grant had not been fixed until September, 1861, when the surveyor general of New Mexico transmitted to the commissioner of the land office at Washington an official survey of the tract known as "Private Land Claim No. 43." It appears that congress, by an act approved March 1, 1860, entitled, "An act to confirm a certain private land claim in the territory of New Mexico,"

had on the report of the surveyor general of the territory, dated November 24, 1860, and before the filing of the official survey and the field notes in the commissioner's office, confirmed the grant according to the recommendation of the surveyor general, and in advance of the filing of the official description of the grant. The act became operative to pass the title to the grant at least as soon as its boundaries were definitely fixed by the official survey, etc., of the surveyor general, filed with the commissioner of the general land office. The history of the grant and the language of the act of confirmation leave no doubt as to the intention of congress: "Provided that the foregoing confirmation shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." In 1876 (May 20) a patent issued to the New Mexico Mining Company for "the tract of land embraced and described in the foregoing survey, excepting and reserving from the transfer by these presents so much of the land embraced in said survey as is included within the survey of the Canon del Agua grant, approved by the surveyor general of the territory of New Mexico, on the sixteenth day of October, 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the first day of July, A. D. 1875, and estimated to contain about two hundred and fifty-nine acres as aforesaid; and with the further stipulation that, in virtue of the provisions of the aforesaid act of congress approved March 1, A. D. 1861, the confirmation of this claim and this patent shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

It is clear that, as far as the rights of the parties to this suit are concerned, the act of confirmation of 1861 was a grant in praesenti, and in effect conveyed

the title as soon, at least, as the boundaries were officially and definitely ascertained. It is true, in the patent, about two hundred and fifty-nine acres, covered by the act of confirmation, are excepted and reserved to Jose Serafin Ramirez. The right to make such reservation is expressly stipulated in the act of confirmation. The patent operated only as convenient documentary proof of the original grant, and of its subsequent ratification by congress, on the terms therein expressed. *Langdean v. Hanes*, 21 Wall. 521. Elias Brevoort, through whom complainant claims title, obtained deeds, in 1873, from the collateral heirs of Jose Francisco Ortiz, purporting to convey all the interest which they had in the grant. Neither plaintiff, nor any one of those through whom he claims title, was ever in the possession of the premises, or any part thereof, either in privity with or adverse to defendants, or their grantees, at least since 1848. Defendants, on the contrary, maintain, and offered evidence tending to prove, that for more than twenty years prior to the commencement of this suit they had been in actual possession of a portion and in the constructive possession of all the premises in controversy, openly, continuously, and adverse to all the world; claiming title to the whole thereof through the grant and the act of confirmation of 1861. Section 1880, Compiled Laws, New Mexico, provides that where any person shall be in possession for ten years of any land granted by the government of Spain or Mexico, "holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee simple, and no claim by any suit in law or in equity effectually prosecuted shall have been set up or made to said lands, tenements, or hereditaments, within the aforesaid time of ten years, then, and in that case, the person or persons, their children, heirs, or assigns, so holding possession as aforesaid, shall be

entitled to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deeds of conveyance, devise, grant, or other assurance as aforesaid, in preference to all, and against all, and all manner of person or persons whatsoever."

We are of opinion that the evidence in the cause amply sustains the finding of the master that the bar of the statute had attached before complainant brought his action. The testimony, it is true, is somewhat conflicting as to the nature and extent of defendants' actual possession; still, there is enough evidence, in our opinion, tending to show that defendants had maintained an open, adverse, and continuous possession under claim of title in fee for more than ten years before the bringing of this suit. This we hold is sufficient to bar plaintiff's right of recovery.

This brings us to the consideration of the second assignment of error, the invalidity of the "mutual will" of Jose Francisco Ortiz and wife. This instrument was executed within the limits of the present territory, while the same was a political department of the republic of Mexico. It is a very peculiar document, almost unknown to our jurisprudence. If it were recognized by the laws of the sister republic, and executed in accordance therewith, or in accordance with prevailing customs and usages, having the force of law, it is the duty of the courts of this territory to give it the same legal effect as it would receive had no change of government taken place. "The laws heretofore in force concerning descents, distributions, wills, and testaments, as contained in the treatise on these subjects written by Pedro Murillo Velarde, shall remain in force, so far as they are in conformity with the constitution of the United States and the state laws in force for the time being." Section 1, Kearney Code, September 22, 1846: *Leitensdorfer v. Webb*, 20 How. (U. S.) 177. *Escriche* (Dict. de Leg. y Jur., p. 1498)

WILL: attestation: validity.

defines such instrument as follows: "A mutual testament is one which two persons reciprocally make in favor of the survivor, as when husband and wife constitute themselves heirs, the one to the other, in case of their dying without forced heirs. In the execution of these testaments, whether open or sealed, the same solemnity should be observed and the same number of witnesses should be present as in those made by a single testator, except that the number of witnesses need not be doubled because of there being two testators." The instrument in question was what is known as an "open" or "nuncupative" testament. The two kinds of wills are thus defined by Velarde (*Prac. de Test.*, cap. 1, p. 3): "As a person may declare his will by writing or by word of mouth, it follows that wills are divided into two classes—written, generally called 'cerrado' or sealed, when the testator expresses his will on paper written and sealed, declaring it to be his testament, in the presence of seven witnesses, and before a notary, who should sign their names upon the cover or envelope with the testator; nuncupative, which is also called 'abierto' or open, and which is the most common, and is authenticated when the testator manifests his will by word of mouth before witnesses, with the formalities required by law." After enumerating the several formalities required in the execution of wills, he proceeds: "The second formality is the presence of witnesses. For an abierto or open will, three are, at least, required, residents of the neighborhood where the will is made; besides, it should be executed before a notary public, or escribano publico. If there be no notary, five witnesses, residents of the neighborhood, should be present; and if that number can not be obtained, three will suffice." This testament, executed in 1841, one of the joint makers dying in 1848, is an ancient document. No indicia of suspicion, fraud, or alteration appear upon its face. It is

found in the custody of those claiming and holding possession of the property referred to therein, including the Alcalde Chacon. It purports to have been executed by the parties in the presence of three attesting witnesses. Hence every reasonable presumption should be indulged in favor of its validity. Assuming that five witnesses, residents of the vicinity, could not be obtained to attest its execution, we are of the opinion that the will was executed in the presence of three witnesses, and that such number was sufficient to make its execution regular and valid. Besides, there is abundant evidence showing that the republic of Mexico never furnished the department of New Mexico with such an officer as an *escribano publico*, before whom wills could be executed according to the provisions of law; that, in such emergency, the people of this distant dependency, *ex necessitate rei*, had been accustomed to execute such instruments in presence of an *alcalde* or judge of the first instance, before two attesting witnesses; that such custom had been general, continuous, accepted, and recognized as having the force of law for at least a hundred years before the date of the will in question. The expert, Diego Archuleta, a Mexican lawyer, and former member of the Mexican congress, swears positively to the existence of this custom. An examination of the archives, deeds, wills, etc., in custody of the proper depository in Santa Fe, corroborates the testimony of the expert on this point. Such being the custom, a will executed in accordance therewith is valid. *Adams v. Norris*, 23 How. (U. S.) 353; *Panaud v. Jones*, 1 Cal. 497; *Von Schmidt v. Huntington*, Id. 55; *Castro v. Castro*, 6 Cal. 158; *Lewis v. Pitcher*, 10 Cal. 465. In connection herewith, see *Pino v. Hatch*, 1 N. M. 130; *Hayes v. Bona et al.*, 7 Cal. 154. It is always safe to adopt every reasonable presumption in favor of the validity of an instrument of this character. Husband and wife, in the absence of children, deter-

mine, in view of the probable death of the one before the other, to make adequate provision for the wants and comforts of the survivor. The husband dies in 1848. The widow claims and asserts her rights under the will as the absolute owner of all the property of which he died possessed. She disposes of such rights to bona fide purchasers. For more than forty years before this suit was commenced, they occupy, improve, and pay taxes on this property. Plaintiff's grantor, and those through whom such grantor claims title, relatives of the deceased Ortiz, and residing in the vicinity of the grant, remain silent; acquiesce by such silence in the disposition so made of the property for so long a period, while the same is being enhanced in value by the capital and labor of honest purchasers or occupants. In fact, not a word is heard from any of the kindred in relation to the matter until they relinquish, for a trifling consideration, all their interest therein to plaintiff's grantor. Aside from the merits of the case, public policy does not favor the disturbing of vested rights without very grave and satisfactory reasons. The foregoing views dispose of all questions raised by plaintiff in error, and render unnecessary a consideration of the points raised by defendant as to the legal status of the cross bill and the charge of champerty. We may state, however, as a matter of justice to the professional character of the gentlemen charged, that we do not find any ground upon which to base even a suspicion of improper conduct. Finding no error in the record, the judgment should be affirmed.

LEE, SEEDS, and McFIE, JJ., concur.

[No. 316. July 25, 1891.]

DAVID C. PRYOR, APPELLEE, v. THE PORTS-
MOUTH CATTLE COMPANY, LIMITED,
APPELLANT.

DAMAGES—TROVER—PLEA, GENERAL ISSUE—EVIDENCE.—In an action of trover for damages for an alleged conversion of certain cattle, where the defendant pleaded the general issue, and the evidence was: That three years before, plaintiff received, in accordance with an executory contract with certain parties for the purchase of the same, four hundred head of cattle to be of a certain grade and quality; that he accepted one hundred and eighteen, and put his brand upon them, but rejected the remainder, because not of the required grade; put them in a new brand, not his own; turned them loose upon the common range with other cattle of the vendors, and other parties; and notified the vendors, by mail, of his action in the matter, who paid no attention to his letter; that there was no further contract or arrangement between them; that two years afterward defendant purchased from the vendors all their cattle, excepting those rejected by plaintiff, and shipped a portion of the latter, without objection from plaintiff, who was at the time in defendant's employ, and asserted no claim to the cattle or their price until a year thereafter, when he found he had been charged with the price of them by the original vendors three years before, and testified that he thought they had sold them to certain other parties, who subsequently transferred them to defendant—Held: The evidence was not sufficient to show that the plaintiff was the owner of the cattle at the time of the alleged conversion, and therefore he had no right of recovery.

ID.—RECORDED BRAND—EVIDENCE—INSTRUCTION.—An instruction that a recorded brand is one of the modes of proving ownership, by brand, of property in this territory, and that when an animal is found bearing such brand, the jury may find, from that proof alone, that the animal belongs to the owner of the brand, was misleading, having assumed that the record of the brand had been proved, where the only evidence on that point was plaintiff's testimony that he did not know whether the brand had been recorded or not.

ID.—TITLE—INSTRUCTIONS.—An instruction that a verdict and judgment for plaintiff would operate to transfer his title to the cattle to defendant was clearly erroneous. An unsatisfied judgment in trover does not pass the property. It is a mere assessment of damages, on payment of which the property vests in the defendant. *Benj. on Sales*, p. 54, sec. 49.

APPEAL, from a judgment in favor of plaintiff, from the Fourth Judicial District Court, San Miguel County. Judgment reversed.

The facts are stated in the opinion of the court.

FRANK SPRINGER for appellant.

WILLIAM BREEDEN, M. W. MILLS, and E. A. FISKE for appellee.

O'BRIEN, C. J.—This is an action in trover brought by the appellee, David C. Pryor, in the district court of Colfax county, to recover of the appellant, the Portsmouth Cattle Company, the sum of \$9,000 damages as the value of three hundred head of cattle, alleged to be the property of the plaintiff, and to have been unlawfully taken by the defendant company, and converted to its use. The defendant pleaded the general issue. The cause was tried to a jury, at the April term, 1886, of the district court of Colfax county, resulting in a verdict in favor of the plaintiff for \$3,000. Defendant thereupon moved for a new trial upon the following grounds: That the verdict is unsupported by the evidence; that it is contrary to the weight of evidence; that it is contrary to the instructions of the the court; that it is excessive; that there was no proof of a demand or refusal before suit; that the court erred in admitting upon the trial certain testimony over defendant's objections; that it erred in refusing to give certain instructions asked by defendant; that it erred in giving certain instructions excepted to by defendant; and lastly, that the verdict is against both the law and the facts. And thereupon, by agreement of parties, the venue was changed to San Miguel county, where on the third of December, 1886, the motion for a new trial was overruled, and judgment entered upon the verdict. A bill of exceptions was thereafter settled

and signed, and defendant took his appeal from such judgment to this court, where the same has since been pending. The principal facts in the case may be briefly stated as follows: In the winter of 1880, the plaintiff, David C. Pryor, contracted with the Pryor Brothers of Colorado, for the purchase of four or five hundred head of cattle of a certain grade and quality, to be delivered to him on his range in Colfax and Mora counties New Mexico. In the fall of 1881, Pryor Brothers drove their cattle from Colorado to Mora county, in this territory, and turned them loose upon the common or open range. That of the number so driven down, four hundred head were segregated from the herd, and tendered to plaintiff in accordance with his contract. That all of the cattle so turned over to him did not suit him. That they were not such as he had agreed to purchase. That in consequence he only accepted one hundred and eighteen of the number, which he branded in his individual brand, the "Comet," and the remaining two hundred and eighty-two head he put into a brand called the "3P," thinking and determining that they should go back to the Pryor Brothers as they were not the kind of cattle he liked. A few days afterward he wrote to one of the Pryor Brothers in Colorado that he had not received the kind of cattle that he wanted. Of those that he had put into the 3P brand, fifty were cows, and two hundred and thirty-two were steers, ranging from two to three years old. Plaintiff at this time, and up to the fall of 1882, was in the employment of Pryor Brothers. In the same year Pryor Brothers sold their cattle in New Mexico, but not those bearing the 3P brand, to Underwood, Clark & Company, who transferred their purchase to the defendant, the Portsmouth Cattle Company. In September, 1883, plaintiff was employed as supervisor or manager of their cattle by the defendant company. In the month of October following, the defendant com-

pany shipped under charge of plaintiff, four hundred head of steers from Raton, in Colfax county, to Kansas City, Missouri. This shipment was consigned to commission men in the name and for the benefit of Pryor Brothers, it being part of the contract between them and Underwood, Clark & Company, at the time the former sold the cattle to the latter, that Pryor Brothers were to market the beeves, and apply the proceeds towards the payment of notes given for a balance due on the purchase. In this shipment plaintiff saw from thirty-five to fifty or sixty steers in the 3P brand. He made no claim at that time to anyone for the value of these steers, nor did he assert any claim of ownership. For the first time, in the fall of 1884, one year after this consignment, plaintiff demanded payment for such cattle in the 3P brand as the defendant company had used or disposed of, but he is not certain whether he asked pay for all in that brand on the range. His reasons for not claiming such cattle were that he thought his brothers had sold them, and he says: "I wrote to him, and he never paid any attention to it, and I was charged with the cattle." He supposed, at the time, that his brothers, or one of the Pryor Brothers, had sold them to Underwood, Clark & Company. His testimony on this very important question is: "Question. State your name and residence. Answer. My name is David Pryor, and I live in Colorado. In 1880, up to 1883, I have lived in this county, and a portion of the time in San Miguel county. In 1882 I worked on this range, in this county and Mora county. In the fall of that year I received from my brother—He brought one hundred head of cattle from Colorado to New Mexico; in the fall of 1881, it was. I received four hundred head of cattle, which as my property I was to place in my individual brand. Up to this time I had no brand in Colfax or Mora counties. These cattle which my brother sent me were not the kind of

cattle in the bill that I liked, or he agreed to let me have. So I branded out of the four hundred head what I wanted, in my individual brand, which was the Comet 2 V's, and a bar directly behind it; V's pointing toward the head, one inside the other, and the bar directly behind it; and then the remainder of these cattle, which amounted to two hundred and eighty-two head, that I branded, I put in three P's, thinking and determining that they should go back to Pryor Brothers, as they were not the kind of cattle I liked. A few days after which time I wrote to one of my brothers—the one in Colorado, I think—that he had not sent me the kind of cattle I liked. Q. Well, how many cattle do you swear were in that herd in Raton, with the 3P brand on them? A. I think I can swear there were thirty-five. Q. That is as near as you can come to answering the question, is it? A. Yes, sir; I think it is. Q. (By a juror.) Did I understand you, you never sold the 3P brand at all? A. Never sold any 3P brand. Q. What has become of them? A. I don't know. Redirect examination by Mr. Breeden: Q. Now, Mr. Pryor, this last answer of yours, as to how many cattle you saw—state fully about the number of cattle you shipped up there,—the three P cattle. A. I stated in the first statement that I could swear as many as thirty-five, and in the next statement I said I could swear there was thirty-five. I would like to state, that being my property at that time, or should have been, I noticed them closer than I did other cattle. Q. Is that all? A. There was something else I omitted to state. The reason I didn't claim those cattle was because I thought my brother had sold them, and I wrote to him, and he never paid any attention to it, and I was charged with the cattle. Q. (By the court.) As I understand you, you supposed your brother had sold them. A. Yes, sir. Q. And when you came to settle for them, they had been carried into your account with them?

A. Yes, sir. Q. (By Mr. Breeden.) You supposed that your brothers had sold them with other cattle that they had sold? A. I supposed that he had sold them to Underwood, Clark & Company. I had very little dealings with my brothers for two or three years. I didn't see them only for a little while at a time. I had never seen the bills of sale, or contracts to Underwood, Clark & Company. Q. When you ascertained that your brothers had not sold that brand, what did you do? A. Why, I called on Mr. Holmes for a settlement in Kansas City. Q. Why did you call on Mr. Holmes? A. Because I knew he used some of the cattle, and I knew that they were claiming the brand. Q. Did you claim that Mr. Holmes got them? A. No; but the Portsmouth Cattle Company, through Mr. Holmes. Q. Then you called on Mr. Holmes as the manager of the Portsmouth Cattle Company? A. Yes, sir." He further on states that he had never had a bill of sale for the 3P brand of cattle, and never called on Pryor Brothers to settle with him for the price of the cattle as sold by them, for the simple fact that they didn't sell them.

The foregoing contains all of the substantial proof offered as to the conversion of certain cattle in the 3P brand, included in the shipment from Raton to Kansas City in the fall of 1883, as well as the principal parts of the testimony offered in support of plaintiff's ownership. Without further adverting to the proceedings on the trial, or discussing the various points
TROVER: general
issue: evidence. very ably presented by counsel in their respective briefs as to the several acts of the defendant company in reference to the cattle in controversy, we must determine from the evidence whether plaintiff has a right to bring this action against the defendant. If he had not, the conduct of the defendant in the premises must be immaterial to him, and that must determine the case as far as his rights are concerned.

Was he, at the time of his alleged acts of conversion, the owner of the property? He predicates his cause of action upon his unqualified ownership. The undisputed facts upon this important phase of the case appear to us simple and decisive. In the fall of 1881 he received, in accordance with the terms of an understanding or executory contract had with Pryor Brothers, of Colorado, four hundred head of cattle. He examined them, accepted only one hundred and eighteen of the number, and put them in his own recorded brand, the "Comet." The remaining two hundred and eighty-two he did not accept, because they did not suit him; were not such as he had bargained for; did not put them in the Comet brand, but put them in a new brand, not his own, for the purpose of identification; turned them loose upon the common range, where they mingled with other animals pasturing thereon belonging to Pryor Brothers and other parties; and at once notified Pryor Brothers by mail of his action in the premises. The latter paid no attention to his letter. This conduct on the part of the plaintiff shows a consummated sale of the number of cattle accepted, if the vendors acquiesced, and as unmistakably shows a repudiation of any bargain or arrangement previously made in reference to the two hundred and eighty-two head, discarded by plaintiff, thus relieving himself from all legal liability therefor, whether the vendors acquiesced or not in plaintiff's act of repudiation. Plaintiff, then, did not become the owner of the two hundred and eighty-two head; did not accept, nor agree to accept, them at the time of the tender, in the fall of 1881.

The evidence fails to disclose any other dealings or transactions between him and the Pryor Brothers in respect to these cattle; no new agreement; no further delivery; no other acceptance; in fact, nothing except the persistent refusal of plaintiff to recognize the two hundred and eighty-two head as his own until

the fall of 1884, when he discovered that Pryor Brothers had him charged with the four hundred head. It does not appear that even then he assented to the propriety or legality of such charge, that he agreed to pay it, or in any way rendered himself liable to Pryor Brothers for the value of the rejected animals. In the fall of 1883 plaintiff was an employee of defendant, working on the same range; assisted in collecting and shipping for the defendant about four hundred head of cattle for sale to the Kansas City market; recognized in the number so shipped thirty-five, fifty, or sixty, in the 3P brand, a part of the two hundred and eighty-two rejected by him; saw them sold for more than \$1,000; never asserting any claim to the animals or their price until a year thereafter, when he found that Pryor Brothers had him charged with all the cattle sent him three years before. During this period of three years he had believed, must have believed, that these 3P brand cattle were not his, for the simple reason that he had never accepted them. Then, there was no sale of these animals recognized by plaintiff during this period. The whole tenor of his conduct is in line with that theory. It is unreasonable, if not absurd, to suppose that any man of common sense would stand silently by, and even assist the perpetrators, while from one to two thousand dollars' worth of his property is being sold, and the proceeds taken by others. And what reason does he give for his strange conduct? He thought that Pryor Brothers had sold them to Underwood, Clark & Company, and that the cattle had subsequently been transferred by them to the defendant. Would he think this if he regarded himself as the purchaser—as the owner of the animals? There was no sale of the four hundred head in the fall of 1881, unless both parties assented. Plaintiff's conduct shows that he did not assent, and it further shows that until the fall of 1884 he believed that Pryor Brothers had recog-

nized the legal effects of such dissent. Aside from this, there is no proof of any subsequent consummated sale of these animals, nor of any ratification of prior negotiation in reference thereto. Hence we find that at the time of the alleged conversion the plaintiff was not the owner of the property, and therefore had no right of recovery, and the court below erred in refusing to grant defendant's motion for a new trial.

Defendant excepted to three of the twelve instructions given by the court to the jury. The first one had

RECORDED
brand: evi-
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structions.

especial reference to the provision of the statute regulating the branding of animals, and declaring the legal effect thereof, when done in compliance with the statute. This instruction is quite lengthy, and we can only give portions of it: "Another section provides that brands may be recorded in the county where the owner resides; so that a party having an established brand may have it recorded either in the county where his cattle are liable to stray and range, or in the county where he resides, or in both, and when it is recorded under the provisions I have called your attention to, in that way it gives him a right to use the brand, and is one of the modes by which evidence of ownership by brand may be established. * * * Now, these provisions of the Compiled Laws of the territory that I have read to you constitute a statutory mode of raising prima facie evidence as to the ownership of property, and when a brand has been recorded under these sections that I have read to you, and in the manner provided in these sections, and that has been proven to the satisfaction of the jury, and an animal is found bearing such brand, the law then steps in, upon its being proven that the brand has been so adopted, and thus recorded by any particular person, and that the brand is on an animal, and provides that from that proof alone the jury are warranted in finding that animal belongs to the brand thus

recorded and which it bears. Now, in this territory, that is one of the modes by which the ownership of property may be proven, and it is a proper mode, where all these facts are before the jury." This instruction is misleading. It assumes that the record of the brand may have been proved, when the only fact stated in that connection was plaintiff's answer that he did not know whether the 3P brand had been recorded or not. Such answer neither proves nor tends to prove the record of the brand. The rights of the parties should not be imperiled by an instruction of this nature, especially on so vital a point as the ownership of the property in question.

Defendant excepted also to the following instruction: "(7) A verdict and judgment for the plaintiff in this case would operate to transfer to the defendant the plaintiff's title in and to the cattle on account of the alleged conversion of which this suit is brought, and the defendant would thereby be entitled to hold any of said cattle as against the plaintiff, and as against the plaintiff would be held to be the owner of the same." This is plainly erroneous, and was well calculated to facilitate the labors of the jury in finding for the plaintiff. "An unsatisfied judgment in trover does not pass the property, and is a mere assessment of damages, on payment of which the property vests in the defendant." *Benj. Sales*, p. 54, section 49. As there may be a new trial of this case, it is not deemed necessary to pass upon the other errors alleged in the record. The judgment is reversed.

McFIE, LEE, and SEEDS, JJ., concur.

[No. 342. On rehearing, July 25, 1891.]

**TORLINA, PLAINTIFF IN ERROR, v. TRORLICHT &
HOHNSTRATOR, DEFENDANTS IN ERROR.**

ATTACHMENT—FINDING, REVIEW ON APPEAL.—On a review of the findings of a court, the same rules apply as to the sufficiency of the evidence to support such findings as prevail on the review of the verdict of a jury.

ID.—INSTRUCTIONS.—Where the court below has fully and fairly declared the law applicable to the whole case, the appellate court will not reverse the cause for any alleged error in its refusing other instructions asked, but not given, on the trial.

ID.—DEED OF ASSIGNMENT—DELAY—FRAUD.—Held, on petition for rehearing: The court is of the same opinion heretofore rendered in this cause, at the January term, 1889, 5 N. M. 148, to wit: That a deed of assignment, made by a debtor in good faith and with the honest intent to apply all his property to the just payment of his debts, but requiring some slight incidental delay necessary to the conversion of the same, by proper means, into cash, for that purpose, is not, by reason of such delay, fraudulent in law.

PETITION for rehearing. Petition overruled.

The opinion states the case on rehearing.

NEILL B. FIELD for plaintiff in error.

W. B. CHILDERS for defendants in error.

LEE, J.—The plaintiff in error on the second day of March, 1889, filed in this court his petition for rehearing, supported by forcible and able argument. The questions discussed are those considered by the court in the opinion heretofore rendered. The defendants in error in their brief originally filed presented two points for consideration. The first was, where a question of fact had been submitted to the court and passed upon without a jury, the appellate court could not review the rulings of the court below thereon. The court held adversely to the proposition, as it was urged

by the defendants, and fully considered all the questions of error presented by the plaintiff. This question has since been before this court, and it was held that, under the statutes of the territory as they then existed, authorizing the waiving of a jury and trial by the court, the general verdict of the court might be reviewed, the same as a general verdict of a jury. Therefore nothing would be considered in the case except such rulings of the court, during the progress of the trial, as have been duly excepted to and brought before the appellate court by a bill of exceptions. *Lynch v. Grayson*. But as the judgment of the court below, as well as the opinion of this court sustaining the same, in effect is in harmony with the views as expressed in the case referred to, we will not further consider the point than as it may have the effect to limit our consideration to the exact questions decided by the court below, and which has been properly brought up for our determination. As before held, "the weight of evidence and the inferences of fact must be drawn by the court below, as it was the judge of that court, and not the supreme court, that was substituted by agreement of the parties in the stead of the jury." *Insurance Co. v. Folsom*, 18 Wall. 237.

FINDING: review
on appeal.

The second point made in the brief of defendants in error is thus stated by them: "But, even if the court can review the refusal to give the instruction asked by plaintiff, such refusal was not error. The court fully and fairly declared the law in the instructions given or adopted. Refusal to give instructions in the abstract is no ground of reversal, where they could not have been applicable to any evidence, and proper instructions, appropriate to the case, were given so that the party preferring those refused can not have been injured by the refusal. If the law arising from the evidence is fairly charged, or, as in this case, fully

recognized, by the court's refusal to give other instructions to the same effect is not error." It is too well settled to need citation of authorities that, if the court below fully and fairly declares the law applicable to the whole case and the several parts thereof, the court of last resort will not reverse the cause for any alleged error in refusing other instructions asked on the trial, but not given. In this case the instructions given, or rather declared and held by the court, do fully declare the law as applicable to the issue and evidence. Two questions reasonably arose in the trial court upon the evidence: First, were the defendants about fraudulently to dispose of their property at the time the writ of attachment issued, so as to defraud plaintiff's creditors? Secondly, were they about to dispose of their property subject to execution, so as to hinder and delay their creditors, in such a manner as that such hindering and delaying would amount to fraud in law, without reference to the actual intent present in the minds of the defendants at the time of the transaction? The law, as held by the court below, is in favor of the plaintiff on the first point. As to the second one, the trial court, in the third and fourth declarations, held that an assignment for the purpose of delaying creditors twelve months, or indefinitely, until business improved, or until such time as the property should so advance in value as to pay all the debts of the debtor, would be an unreasonable delay, and therefore fraudulent.

The law, as held by the trial court, and applied to the evidence, was in favor of the plaintiff, both as to the question of actual fraudulent intent and such unreasonable postponement of payment as to constitute fraud in law, following on those questions the law of the case as contended for by the plaintiff below. On these two points that court, however, evidently held the evidence not to prove either actual fraudulent intent, or

such unreasonable delay as to amount to fraud in law; otherwise the court would have found for plaintiff on that branch of the issue. The finding of the court on the weight of evidence is discussed at some length in the former opinion, but the action of the court below for an alleged error as to the conclusions to be drawn from the evidence is not reversible here, if there is any substantial evidence in support of the finding of the court below. The inquiry before this court is whether the trial court erred in its refusal to give the instructions, or to declare the law to be as asked by the plaintiff. If the court below had found the evidence to have proven that the defendants intended to make such an assignment of their property as to delay their creditors in the collection of their debts twelve months, or so as to create an unreasonable delay, it would certainly have found for the plaintiff, under the view of the law declared by that court in the points held, or the instructions given. If, however, the court found that the evidence proved an intention on the part of the defendants, before the writ of attachment issued, to make an assignment of their property, which would create but slight delay, and also held that such an assignment was not fraudulent in law, such finding would have been, as it was, for the defendant, because the law, as declared by the trial court upon such a state of facts, would be with the defendant. The record is silent, except as the same may be inferred, as to the actual views entertained by the trial judge at the trial, as it only shows on that question that the case was tried at the special September term; taken under advisement; and on the fourteenth day of October, 1886, a general finding for the defendant entered; so we are unable to determine, even if the question were important, whether the ruling here is placed on the same ground as that upon which the cause was determined below. It seems to us unimportant as to the ground

on which the trial court predicated its action, as the question here is, does there exist reversible error in the record. If the defendant in error had rested his cause here upon the single point that the court could not review the proceedings below, even then, if the court deemed that contention not well taken, it would not be justified in reversing the cause, unless some error was found in the record, and would be bound, before reversing, to examine the whole record to determine whether reversible error was apparent. Certainly this court could not reverse the cause merely because it deemed its powers of review to be greater than defendant's argued in one point of their brief. Nor could the court reverse the cause if, in its judgment, the court below decided right, even though this court should be of opinion that the decision below was placed on wrong grounds. In the opinion originally announced, the instructions refused are set out. A consideration of the instructions given will throw some light upon the point in the mind of the trial court at the time of its refusal to give the instructions about which complaint is now made. It is evident by the instructions declared that the court below on the trial of the cause had in mind the question considered in the opinion in this cause, which we are now asked to withdraw or modify. The court below refused to declare the law as stated in the second, fifth, and sixth propositions asked, but held the law to be as stated in the third, fourth, and seventh propositions. These various propositions are here treated as instructions asked, as the cause was tried without the intervention of a jury, and asking the court to declare the law was equivalent to asking an instruction. The points of law given or declared, and held on the trial to be applicable to the evidence asked for by the plaintiff, are as follows: "Third. If it appears from the evidence in this cause that the defendants were about to make an assignment of their property for the pur-

pose of deferring payment of any or all of their creditors for a period of twelve months, or until business improved, then such intention on the part of defendants was a sufficient warrant to plaintiff in suing out the writ of attachment in this cause, and the finding should be for the plaintiff. Fourth. If it appears from the evidence in this cause that the defendants, before suing out the writ of attachment herein, were about to make an assignment of their property to prevent a sacrifice thereof, and that the intention existed in the minds of the defendants, or either of them, to place their property beyond the reach of their creditors, or any of them, until such a time as it should advance in value, or until business should improve, or times get better, then the finding should be for the plaintiff, even though it was the intention of the defendants ultimately that their creditors should receive the entire proceeds of a sale of their property." "Seventh. Any assignment contemplated by the defendants, the reasonable and probable result of which was to defraud their creditors in the collection of their debts, is sufficient to sustain the attachment in this cause."

In this connection it may be observed that the plaintiff in error, in his argument for rehearing, says: "Is this court prepared to say that an assignment whereby the assignor retains dominion over his property, and prevents his creditors from the collection of their debts for a period of twelve months, is not, under the decision of every respectable court in Christendom, including Missouri, fraudulent in law?" This court has certainly not said so, either in terms or in effect, and the trial court on the hearing expressly declared the contrary doctrine, as appears by a careful reading of the third and fourth points, or instructions, above set out. The court on the trial as to that question of law was evidently with the plaintiff, but against him on the evidence relating to that proposition; but on the point

that delay merely, such delay as might reasonably be necessary to convert the defendant's goods into cash to pay debts, embraced in all the points refused by the court, but more clearly in the fifth and sixth, the court below was against the plaintiff in error on the law, but might have been with him as to the facts relating to that question. A careful reading of the instructions asked on the trial by the plaintiff makes it apparent they were critically drawn, and so considered on the trial. The fifth and sixth instructions are in exactly the same language, except that in the fifth the word "hinder" is used, while in the sixth the word "delay" is found, evidently on purpose, to raise and save any question that might exist as to the meaning of the two words. In the first and second instructions the words "hinder" and "delay" are both used, with the addition of the words "or defraud," so that in each of the four instructions refused is contained the proposition that, if the defendants were about to sell, convey, assign, or dispose of their property, so as to delay, even in the least degree, their creditors, such an act would be fraudulent. The instructions embracing that proposition of law were refused, presumably because the court below, whatever its opinion might be as to the facts relating to the proposition of law, did not believe that a sale of the defendant's property, or an assignment thereof, creating slight or necessary delay incident to a conversion of the property into money, was fraudulent in law. The third and fourth points, or instructions asked and given, relate also to the question of delay. The third expresses the idea of delay in the words, "deferring payment of their creditors, or until business improved," while the fourth expresses the idea of unreasonable delay in this way: "That the intention existed in the minds of the defendants, or either of them, to place their property beyond the reach of their creditors, or any of them, until such time as it

should advance in value, or until business should improve, or times get better, then the finding should be for plaintiff." It will thus be seen that the instructions contained a clear distinction between the effect of delay merely in the assignment, such delay as is necessary, usual, and reasonable, to enable the debtor to convert his assets in that way into cash, and such unreasonable and unusual delay as would unjustly postpone the creditor in securing payment, and therefore operate on him as a fraud. This distinction is made very apparent by contrasting the third and fourth instructions given with the fifth and sixth refused. In view of the terms of these instructions, it does not seem to us that the contention in the petition for a rehearing that the court in the original opinion departed from the question before the trial court, is well founded. As the opinion heretofore filed sustains the trial court on the questions of law, it may be that the points relating to the evidence might have been more briefly disposed of by a mere reference to the rule that this court will not reverse on any question relating to the weight of the evidence, where there is substantial evidence to support the action of the court below; but this court, properly, as we think, was of opinion that some consideration of the evidence would throw light on the questions involved, and be more satisfactory to those interested.

Complaint is made of the following statement in the opinion: "The court below was not asked to declare that every assignment having the effect to create an unreasonable delay to the creditors should be held fraudulent, but to so declare if the assignment resulted in delay merely, however short the time might be, or however beneficially it might result to the creditors." The statement in the original opinion is evidently an inadvertence of statement, and, in view of the third and fourth declarations heretofore set out, the opinion

heretofore rendered is so far modified as to withdraw therefrom the above quoted expression, which no doubt unintentionally found its place in the opinion heretofore rendered. This, however, in no way affects the reasoning of the opinion, or the conclusion reached; but is a mere modification of an unintentional expression made by the court in the course of statement.

It is strongly urged by the plaintiff that the supreme court of the United States holds a doctrine at variance with that declared by this court; and we are especially referred to the case *Means v. Dowd*, 128 U. S. 280, as supporting the plaintiff in his application for rehearing. We have carefully examined that case, and are of the opinion that the general expressions used by the court therein must be considered, when it is looked to as authority, with reference to the instrument then under consideration, to determine the point really decided by the court. The facts of that case, as they appear in the record, are the following: April 24, 1876, Montgomery & Dowd were merchants in North Carolina, greatly embarrassed, and they made a conveyance of all their goods and property to other parties, Davidson & Dowd. It was provided in the assignment that the assignors, Montgomery & Dowd, should remain in possession of the assigned property, and continue to sell the same at their own discretion, and collect the moneys therefor. The funds so collected were to be by the assignees deposited weekly in bank, and the stock from time to time replenished from the proceeds of the sales, under the direction of the assignees; the assignees were to be paid their commission; and, after expenditures for replenishing stock and incidental expenses, the surplus was to be applied to the payment of certain preferred debts, first, and finally the residue to general creditors, with the remainder, if any, to assignors. This all appeared upon the face of the assignment, the validity of which the supreme court had under consideration.

In addition, the facts established, as throwing light upon the instrument, that the preferred creditors were the near relatives of the debtors. The instrument, although made in April, 1876, was not placed on record until July of the same year, and the assignors, from April to the last named date, remained in the actual control of the property assigned, selling the same in the usual course of business, collecting the proceeds of such sales, and carrying on the business generally, under the protection afforded by the deed of assignment. This is the kind of instrument which the supreme court in that case, under the circumstances stated, had under consideration, to which it gave construction holding the same to be fraudulent. The language used by the court should be considered with reference to the instrument being construed, and not as intending to give a general rule for the construction of conveyances or assignments wholly different in important particulars, from the one then in the mind of the court. The fact that the assignors, Montgomery & Dowd, were to remain in possession of the goods, carry on business as usual, make collections, replenish stock, etc., under cover of the assignment, make it clearly apparent that the instrument under consideration in that case was on its face fraudulent; and under like circumstances this court would be bound, not only upon the authority of *Means v. Dowd*, but also in view of other cases giving construction to like instruments, to hold a like rule. But in the case here there is nothing from which this court, against the finding of fact by the court below, can say that any such device was intended by the defendants in error. If it was clearly apparent that the defendants in this case intended such unreasonable delay as that contemplated by *Montgomery & Dowd*, of course the rule there adopted would be applied. In that case, in the view of the court the instrument was so fraudulent upon its

face that the court said with respect thereto: "In the case before us the whole face of the instrument has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process. * * * It specifically provides that the grantors should remain in possession of said property and choses in action, with the right to continue to sell the goods and collect the debts under control of the grantees. * * * It is difficult to imagine a scheme more artfully devised between insolvent debtors and their preferred creditors to enable the former to continue in business, at the same time withdrawing their property used in its prosecution from the claims of other creditors, which might be asserted according to the usual forms of law." In view of the facts of that case, and the expressions of the court upon the case as a whole, together with what the court has said and decided in other causes on the same subject, both before the decision of *Means v. Dowd* and since that time, it does not seem to us that the court decided, or intended to decide, that the mere slight delay necessarily incident to conversion of the property of the debtor by assignee, whereby to apply the same to the payment of his debts, amounts to fraud in law; and that principle is the one embraced in the instructions which the court refused to give, and about which complaint is made, in the cause now in this court under consideration.

In *Brashear v. West*, 7 Pet. 608, the supreme court upholds an assignment tending in a considerable degree to delay creditors in the collection of their debts by the usual process of law, and in the course of discussion makes the following statement, in speaking of the assignment in that case: "It is also objected that the assignment is in general terms. That a general assignment of all a man's property is per se fraudulent has never been alleged in this country. The right to make

it results from that absolute ownership which every man claims over that which is his own. That it is a circumstance entitled to consideration, and in many cases to much consideration, is not to be controverted. If a man were to convey his whole estate and afterwards to contract debts, there would be much reason to suspect a secret trust for his own benefit. The transaction would be closely inspected, and a sweeping conveyance of his whole property would undoubtedly form an important item in the testimony to establish fraud. So in many other cases which might be adduced; but a conveyance of all his property for payment of his debts is not of this description. It is not of itself calculated to excite suspicion. Creditors have an equitable claim on all the property of their debtor; and it is his duty, as well as his right, to devote the whole of it to the satisfaction of their claims. The exercise of this right by the honest performance of this duty can not be deemed a fraud. If transferring every part of his property, separately, to individual creditors, in payment of their several debts, would be not only fair, but laudible, it can not be fraudulent to transfer the whole to the trustees for the benefit of all. In England such an assignment could not be supported, because it is by law an act of bankruptcy, and the law takes possession of a bankrupt's property, and disposes of it; but in the United States, where no bankrupt law exists for setting aside a deed honestly made transferring the whole of the debtor's estate for the payment of his debts, the preference given in this deed to favored creditors, though liable to abuse, and perhaps to serious objection, is the exercise of a power resulting from the ownership of property which the law has not yet restrained. It can not be treated as a fraud."

Mayer et al. v. Hellman is a case in point. On the third of December, 1873, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the

same parties, with Henry Muller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy in the case, to three trustees, in trust for equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees. To carry out this assignment necessarily involved a delay to the creditors, such a delay as would enable creditors to convert the property into cash for distribution for payment among creditors. As a matter of fact, some six months did occur before any effort was made to disturb the assignees. More than six months after the execution of the assignment a petition was filed in the district court of the United States, controverting the right of the assignee to hold the property, and in the last named court an assignee in bankruptcy was appointed to take possession of all the assigned property, and administer the same under the bankrupt law then in force. This assignee brought his action against the first assignee to procure possession of the property assigned to him by virtue of the assignment therein dated December 3, so that the question arose as to the legality of the first assignment. The contention was that the first assignment was fraudulent and void, and title was in the assignee under the second assignment. The court held, however, that the first assignment, although it disposed of all of the assignee's property in such a way as to create some delay, was not fraudulent and void, but to the contrary, and upheld the first assignment. It is said by that court, Mr. Justice FIELD delivering the opinion: "The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the bankrupt act, there could be no serious question raised as to its legality. The power which every one possesses

over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed, not only a legal proceeding, but one entitled to commendation. Creditors have the right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hindrance and delay to particular creditors, in their efforts to reach before others the property of the debtor that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction."

Applying the statement of the supreme court of the United States to the terms of the instructions which the court below in this case refused to give, it will be observed that the very hindrance and delay which the court below was asked to declare to be a fraud in law our court of last resort declared not to be so, and it is this distinction between a delay so great and unreasonable in character as necessarily to work injury to the creditor, and slight and necessary delay, incident to the conversion of property into cash, stated by the supreme court in *Mayer v. Hellman*, which this court had in view in the original opinion, as applied to the proposition of law embraced in the instructions refused. It will be borne in mind that in *Mayer v. Hellman* the assignee under the second assignment began his proceeding in the district court of the United

States against the first assignee to recover the property, and one of the theories sought to be maintained by the plaintiff in that case was that the first assignment was absolutely void. The district court took that view of the question, and decided against the first assignee, who carried the case to the supreme court of the United States, and there the ruling of the district court was reversed, and the law held to be in favor of the first assignee. In discussing the question in that case in the supreme court, an argument is made which clearly indicates that the exact point in the mind of that court is as to the fraudulent character of the first assignment. The court observed: "The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of the creditors generally are not opposed to the bankrupt act, though made within six months of the filing of the petition. Their argument is that such an assignment is only a voluntary execution of what the bankrupt court would compel; and as it is not a proceeding in itself fraudulent as against the creditors, and does not give a preference to one creditor over another, it conflicts with no possible inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice NELSON in the circuit court of New York in *Sedgwick v. Place*, and of Mr. Justice SWAYNE in the circuit court of Ohio in *Langley v. Perry*, 2 N. B. R. 180. Certain it is that such an assignment is not absolutely void."

In the case we are considering, the proposition of law clearly involved in the instruction which the court refused to give seems to us to be set at rest by the declaration of the supreme court of the United States that such delays as are unavoidable incidents through a lawful act in no respect impair the validity of the transaction. *Reed v. McIntyre*, 98 U. S. Rep. 507, also sustains the opinion heretofore rendered in

this court in the cause under consideration. Reed v. McIntyre was commenced in the circuit court of the United States for the district of Minnesota. Substantially the facts were that William H. Shuey, a merchant of St. Paul, executed in March, 1874, a deed of assignment conveying his entire property to William S. Combs, in trust for the equal benefit of all his creditors. Upon the same day, immediately after the acknowledgment of the deed of assignment, Combs' assignee entered upon the discharge of his duties as such, and took possession actually of Shuey's stock of goods. During the succeeding day Mrs. Reed obtained a judgment in one of the state courts of Minnesota against Barnard & Shuey for the sum of \$5,000. She immediately issued execution on her judgment, and levied the same on the stock of goods belonging to Shuey in the hands of Combs, the assignee.

The question arose in the circuit court of the United States as to the legality of the assignment to Combs. The circuit court upheld that assignment. Mrs. Reed appealed. On this appeal the supreme court also sustained the assignment to Combs, as being legal and binding. It is said by the court in the opinion: "It is stated in the printed argument of counsel for the appellee that the statement is not controverted by opposing counsel that, at the date of the assignment to Combs, there was no statute of Minnesota relating to assignments by debtors for the benefit of creditors. In determining, therefore, the validity and effect of the assignment in question, we must look to the doctrines of the common law, and to the provisions of the bankrupt act. * * * The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results, as Mr. Chief Justice MARSHALL declares, 'from that absolute ownership which every man claims over that which is his own.' Bra-shear v. West, 7 Pet. 608; Mayer v. Hellman, 91 U. S.

496. Assignments of property for such purposes, not made with the intent to hinder, delay, or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects. Nor, according to the doctrine of the common law, could the validity of the assignment to Combs be assailed simply because its effect was to prevent the appellant obtaining, by judgment and execution, a priority and preference over other creditors. An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law was not for that reason alone fraudulent and void. If not made with the intent to hinder, delay, or defraud creditors, it was sustained at common law. Such an intent was often conclusively presumed, if the assignment contained provisions inconsistent with good faith, or so unreasonable or unusual in their character as to justify the conclusion that it was, in the language of Lord MANSFIELD in *Cadogan v. Kennett*, a mere trick or contrivance to defeat creditors. But where its provisions were consistent with an honest purpose to deal fairly and justly with them, the deed reserving, for the benefit of the debtor or his family, no control over, or interest in, the property, and imposing no improper restrictions upon its speedy sale and distribution in satisfaction of the debts, the consequent temporary interference with the prosecution by particular creditors of their claims by the ordinary legal remedies was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. *Mayer v. Hellman*, supra. Such interference was not regarded as hindrance and delay, within the meaning of the statutes against fraudulent conveyances. * * * Our conclusion, therefore, is that the assignment to Combs could not, upon common law principles, be impeached simply because it had the effect to prevent the appellant, by means of

the execution levy, from securing priority over all other creditors."

So it may be said in the case now under consideration, even if the evidence proved—a question it was for the court below to determine—that the defendant in error contemplated such an assignment as would prevent the appellant, by means of the attachment levy, from securing priority over all other creditors on common law principles, the transaction could not be impeached for that reason, and in so dealing this court would have the support of the authority above quoted. The authority will appear more applicable when it is remembered that in this territory, when this cause was commenced, there was no statute regulating assignments, and the question here, as in the Minnesota case above cited, must be determined on common law principles. In a later case (*Peters v. Bain*, 133 U. S. 685) the same question is again considered. The court says: "The deed of assignment was attacked as fraudulent in law and in fact. We understand counsel to contend that the deed contains certain provisions which must so hinder, delay, and defraud creditors that fraud in its execution is to be conclusively presumed without regard to the intention of the parties. The doctrine in Virginia, settled by a long and uninterrupted line of decisions, is that, while there may be provisions in a deed of trust of such character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent, yet this can not be so, except where the inference is so absolutely irresistible as to preclude indulgence in any other; hence, provisions postponing the time of the sale, and reserving the use of the property of the grantor meanwhile, though perishable and consumable in use; permitting sales on credit; for the payment of surplus after satisfaction of creditors secured; the omission of a schedule or inventory, and the like—have been regarded as insufficient to justify

the court in invalidating the deed for fraud in point of law. The fraudulent intent is held not to be presumed, even under such circumstances, and, in its absence, the fact that creditors may be delayed or hindered is not of itself sufficient to vacate the instrument." The court not only thus recognizes and applies the established law of Virginia on that subject, but also in its discussion considers the question somewhat upon its own merits. The court adds: "The question is not whether the trustees might prove unfaithful—a contingency of which there is no intimation here—but whether the provisions of the deed, if carried out according to their intent, would be fraudulent in their operation." In view of the authorities cited, and others

DEED of assignment: examined and not cited, this court
 delay: fraud. remains of the opinion that it is a safe

and sound doctrine to hold that a conveyance, otherwise honest and in good faith, of the property of a debtor for the purpose of applying the same to the payment of his debts, but involving some slight incidental delay, necessary to the conversion of the same, by reasonable and fair means, into cash with which to pay debts, is not because of such delay fraudulent in law, and hence the petition for rehearing is overruled.

O'BRIEN, C. J., and McFIE and SEEDS, JJ., concur.

[No. 373. July 31, 1891.]

GEORGE L. BROOKS, PLAINTIFF IN ERROR, v.
 THE UNITED STATES OF AMERICA,
 DEFENDANTS IN ERROR.

CRIMINAL LAW—APPEAL—RECOGNIZANCE—SUIT FOR BREACH—DECLARATION—PLEADING.—In a suit for breach of a recognizance, a declaration, which fails to allege that the defendant in the recognizance was ever called into court, or that any default was ever entered therein against him and the recognizance forfeited by judicial order, is fatally defective.

ERROR, from a judgment for the United States, to the Second Judicial District Court. Judgment reversed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiff in error.

EUGENE A. FISKE, United States district attorney, for defendants in error.

LEE, J.—One Earnest L. Lapham, being indicted and convicted in the second judicial district court for an alleged postal embezzlement, took an appeal to this court, and, pending that appeal, was released from custody upon entering into a recognizance, with four sureties, conditioned for his appearance at the next term of the supreme court to receive the judgment on the said appeal, and to abide the decision of the said supreme court, “and to render himself in execution, and to obey every order and judgment which should be made in the premises by said supreme court.” Subsequently an action on the said recognizance was brought in the same district court by the United States against the said Earnest L. Lapham and his sureties, of which the present plaintiff in error is one. In the action the plaintiff therein sets up the bond, and alleges as a breach that the said Lapham did not appear in the supreme court to receive its judgment, etc., but so to do did fail; that he absconded, and was absent from the territory during the entire term of that court to which he was bound to appear; but it does not aver that any judgment or order was ever made or rendered in the case by the supreme court, or that the said Lapham was ever called in that court, or that any default was entered against him therein, or that any forfeiture of said recognizance was therein adjudged or entered of record. The surety, Brooks, demurred to the dec-

laration upon various grounds going to its sufficiency, and the case comes before us for review of the judgment of the district court overruling that demurrer, and assessing damages against him.

In the consideration of this case the court deems it unnecessary to pass upon any of the points raised, except those going to the sufficiency of the allegations in the declaration of the breach of the recognizance.

RECOGNIZANCE: A recognizance is a contract of record.
suit for breach:
declaration. According to the ancient common law procedure, the usual, if not the only, mode of enforcing it upon a breach of its conditions was by the adjudication of a forfeiture by the court, upon its taking judicial notice of the breach, and afterward proceeding to collection by execution. The forfeiture in such a case, was a judgment. Although in modern times the practice has grown up of bringing an action in debt for the recovery of the amount due on a forfeited recognizance, we are unaware that such an action has ever been sanctioned, except after a precedent forfeiture of record. Such an action is analogous to an action upon a judgment. The contract of recognizance is a judicial contract, entirely within the control of the court in which it is taken, and which always has discretion to grant relief from its enforcement. No part of this discretion is vested in the public prosecutor, and he is not at liberty to proceed by action until the judicial will has first been made known by its judgment upon a breach of its condition. Every precedent of such action, which we have found, indicates that such suits are always based on recognizances duly forfeited by judicial order and that the declaration in every such case must allege that the defendant in the recognizance was duly called at the proper time and place, and the recognizance forfeited. It is unquestionable that the breach must be established by record, and can not be shown by proof aliunde. The people v. Van Eps, 4 Wend. 388. It is

essential to a breach of the contract of a recognizance that the declaration must show that the party who was to appear was solemnly called and warned before his default was entered. *Dillingham v. U. S.*, 4 Wash. 422; *State v. Grigsby*, 3 Yerg. 280; *Urton v. The State*, 37 Ind. 339. "The fact that the cognizor had absconded, and could not have answered the call, even if properly made, is of no importance. A recognizance is not forfeited, except by the failure of the principal cognizor to appear and answer to a call made at the proper time and place." *U. S. v. Rundlett*, 2 Curt. 41. The declaration being fatally defective, the court below should have sustained the demurrer. The judgment will be reversed, and cause remanded for proceedings in accordance with the views herein expressed.

O'BRIEN, C. J., and SEEDS, FREEMAN, and MCFIE, JJ., concur.

[No. 373. On rehearing, July 31, 1891.]

GEORGE L. BROOKS, PLAINTIFF IN ERROR, v. THE
UNITED STATES OF AMERICA, DEFEND-
ANTS IN ERROR.

CRIMINAL LAW—APPEAL—RECOGNIZANCE—STAY OF SENTENCE—SECS. 2469–2472, COMP. LAWS, 1884—ACT. JANU. 17, 1862.—Sections 2469–2472, Compiled Laws, providing for appeals and stay of execution in criminal cases; and that, if the prisoner's appeal is from a judgment where the sentence is not death or imprisonment for life, he may be admitted to bail upon a recognizance conditioned that he will appear in the supreme court at the next term thereof and abide its judgment, are not repealed by the act of January 17, 1862 (secs. 2482, 2483, Comp. Laws, 1884) which provides for appeal in cases of conviction for murder where the sentence is death or imprisonment for one or more years, and that the appellant shall be entitled to a suspension of the sentence by filing a bond in such sum as may be fixed by the court. These provisions of the statute were all reenacted in the revision of 1865, are not inharmonious, and must be construed as all in force. *Gallegos v. Pino*, 1 N. M. 410; *In re Watts*, Id. 541; *Chavez v. Perea*, 3 N. M. (Gil.) 99.

ERROR to the Second Judicial District Court. Judgment below for the United States, reversed. Motion for rehearing. Motion overruled.

The opinion states the case on the rehearing.

NEILL B. FIELD for plaintiff in error.

EUGENE A. FISKE, United States district attorney, for defendants in error.

LEE, J.—The United States attorney moves for a rehearing in this case on the grounds alleged that the court has overlooked the distinction between a recognizance and statutory bail bond; and that the laws compiled as sections 2470, 2471, and 2472 of the Compiled Laws, by which provision is made for a recognizance upon criminal appeals in certain cases, have been impliedly repealed by “an act relative to appeals in criminal cases,” approved January 17, 1862, and compiled as sections 2482 and 2483 of the Compiled Laws, which, among other things, provide that in certain cases of criminal appeals “the party taking the appeal shall be entitled to a suspension (stay of execution of the sentence) by filing a bond in a sum to be fixed by the court,” etc.; the contention apparently being that the “bond” so provided for is not a recognizance, and does not need to be forfeited as a condition precedent to a suit upon it, and, further, that the instrument in question here must be deemed merely a “bond” taken pursuant to such statutory authority.

In our view of this case, it is not necessary for us now to determine whether or not the bail bond intended by the statutory provision just cited is of the nature of a recognizance; for we are of the opinion that the recognizance upon which the judgment below proceeded was not taken under that provision. Under sections 2469–2472 of the

RECOGNIZANCE:
stay of sentences:
secs. 2469–2472:
Comp. Laws.

Compiled Laws, if then unrepealed, the convict Lapham was entitled to his appeal, and to the exercise of the discretion of the district court upon the question of awarding him a stay of execution. He applied to that court for such stay, and it was granted pursuant to the provisions now compiled as section 2470.

In addition to such application for a stay, he applied to be admitted to bail under the provisions now compiled as section 2472, which reads as follows: "In all cases where an appeal is prosecuted from a judgment in a criminal case, except where the defendant is under sentence of death or imprisonment for life, the court, which is authorized to order a stay of proceedings under the preceding provision, may admit the defendant to bail upon a recognizance, with sufficient sureties, to be approved by the court, conditioned that the defendant shall appear in the supreme court at the next term thereof to receive the judgment on the appeal, and abide its decision, render himself in execution, and obey every order and judgment which may be made in the premises." The recognizance in question so closely conforms to these statutory requirements that it must have been framed upon the theory that it had not been repealed. Still, it must be admitted the phraseology of the recognizance, no matter whence derived, might be sufficient if employed in a bail bond or supersedeas bond executed under the provisions of section 2483, assuming the appellee to be correct in the contention that those provisions have supplanted the earlier law. But what ground is there for such a contention? The

act of 1862, most of which is compiled in
ACT January 17, 1862. sections 2482 and 2483, reads as follows:

"Section 1. That in future, in all cases of conviction for murder either in the first or any other degree, it shall be, and it is hereby made, the duty of the judge before whom such conviction be had to grant an appeal to the supreme court of the territory; pro-

vided, that the party asking said appeal shall make affidavit as now required by law. Section 2. Be it further enacted, that all such appeals shall have the effect of a stay of execution of the sentence of the court until the decision of the supreme court upon said appeal; and whenever the sentence of the district court shall be that of death, or imprisonment for one or more years, the party convicted shall remain in close confinement until the decision of the supreme court shall be pronounced upon the appeal; and in all cases of appeals the party taking the appeal shall be entitled to a suspension (*prohibicion de la ejecucion*) of the sentence by filing a bond in the sum to be fixed by the court, sufficient to secure the due execution of the sentence of the court in case the judgment of the court below should be affirmed by the supreme court." This act, although entitled, "An act relative to appeals in criminal cases," does not, in our opinion, operate upon any cases whatever except such as involve the crime of murder. At the time of its passage, and until several years after the compilation of 1884, there were five degrees of homicide in this territory; and upon conviction of that crime in the fifth degree the jury was authorized to assess the punishment at a period of imprisonment of not more than ten years nor less than one year, or at a fine not exceeding \$10,000, etc. The imprisonment for homicide, then, could not be less than the period of one year. The act under consideration provides, expressly and exclusively, in its first section, for appeals in murder cases. The next section provides for a stay of execution as of course in all murder cases so appealed; but as to convicted murderers sentenced to death, or to imprisonment for one or more years,—that is, to death, or imprisonment for any term, as it could not be for less than one year,—it provides that the convict shall remain in close confinement during the pendency of the appeal. The act, however, was

intended to be complete in relation to all convictions for murder; and hence in the latter clause of the second section it refers to the only remaining class of convicts for murder, namely, those sentenced, not to death or imprisonment, but merely to pay a pecuniary fine. Manifestly, a good appeal bond, with sufficient security, would be "sufficient" to secure the execution of a mere pecuniary judgment. See *Clawson v. U. S.*, 113 U. S. 143. Any other construction would deprive the district court of the wise discretion conferred by the older law, and give to every felon convicted of any felony, however atrocious, provided it be other than homicide, and no matter how long the term of imprisonment fixed by his sentence, an absolute right to his liberty upon his taking an appeal and giving a bond. Our position in this regard is strengthened by the fact that all the statutory provisions which we have above considered were reenacted in the Revision of 1865, and hence must be construed as all existent, if it is possible to construe them harmoniously. *Gallegos v. Pino*, 1 N. M. 410; *In re Watts*, Id. 541; *Chaves v. Perea*, 3 N. M. (Gil.) 99. The motion for a rehearing will be overruled.

O'BRIEN, C. J., and SEEDS, McFIE, and FREEMAN, J. J., concur.

[No. 437. August 4, 1891.]

JOHN H. SLOAN, ET AL., BOARD OF COUNTY COMMISSIONERS, SANTA FE COUNTY, PLAINTIFFS IN ERROR, v. TERRITORY OF NEW MEXICO Ex REL. BENJ. M. READ, DEFENDANT IN ERROR.

ELECTIONS—MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO CANVASS RETURNS—EVIDENCE—VALIDITY OF JUDGMENT—PRESUMPTION.—On a proceeding by mandamus against the county commissioners of Santa Fe county to compel them, among other things, to canvass an election certificate from precinct number 8, where it appeared the certificate had been purloined, and a copy thereof was admitted in evidence, and the only objections made by defendants to its admission were, that it was not the original, and that it was not authenticated as required by law, but the genuineness of the signatures thereto was not challenged, and that was all the evidence disclosed by the bill of exceptions—Held: It not appearing that any proper objection was raised to the instrument when offered, the court below may have found that it was one of the instruments authorized by sections 1196, 1197, Compiled Laws, and this court will presume that it did so find, and did not, therefore, err in admitting it in evidence.

2. In such case, where the facts and proofs are submitted to the court, without a jury, all the evidence should be embodied in the record. In the absence of such showing in the bill of exceptions the court may indulge every reasonable presumption in favor of the validity of the judgment.

ERROR, from a judgment in favor of relator, to the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

FRANCIS DOWNS and N. B. LAUGHLIN for plaintiffs in error.

E. L. BARTLETT and J. H. KNAEBEL for defendants in error.

O'BRIEN, C. J.—On the petition of defendant in error, the judge of the district court of Santa Fe county, issued, on the twelfth day of November, 1890, an alternative writ of mandamus, directed to the plaintiffs in error, as the canvassing board of said county, requiring them, among other things, to count and canvass an election certificate from precinct number 8, or to appear before the court and produce such returns, and all papers in their custody purporting to be such returns. It further recites that the original returns, including the poll books, ballot box, and certificate from precinct number 8, had been purloined or taken away, and were not before the board when in session to canvass the returns from the county. It then proceeds to direct the board to canvass, as a return from said precinct, a certificate signed by the judges and clerks of election at said precinct, in compliance with the provisions of section 1196, Compiled Laws, 1884. Thereafter plaintiffs in error appeared and filed an answer to the writ. The portions thereof pertinent to the returns from the precinct in question are briefly as follows: That they did not know whether an election had been held in said precinct at the general election in November or not; that they had met at the county seat, as required by law, on November 10, 1890, to canvass all election returns regularly before them; that they had instructed their clerk to have such returns for their official action at such time and place; that the latter had reported to them that he had not in his possession and was unable to find any ballot box, poll books, or returns from precinct number 8; that no such returns from the precinct for the election held on November 4, 1890, had been made to them or to their clerk; and they deny that the same had been taken or purloined from them while sitting as a board of county canvassers. They then allege that on the eleventh day of November, 1890, the relator, Benjamin M. Read,

filed with their clerk a paper purporting to be a certificate of the result of the election held in precinct number 8; that such certificate was not, nor was it alleged to be, the original certificate authorized by the provisions of section 1131 of the Compiled Laws, nor was it a copy authenticated in accordance with the requirements of section 1196 of such laws; that, as the same had not been received by or presented to them in the manner prescribed by law, they treated it as a nullity, and declined to accept or canvass the same. On the issues made by the answer to the alternative writ, a trial was had before the court, without a jury, on the sixteenth day of November, 1890. During the progress of the trial, defendant in error, relator in the court below, offered as evidence, in support of the writ, among other things, the certificate of election from precinct number 8, hereinbefore referred to; to which offer respondents objected, because such certificate was not the original, and because it was not authenticated as required by sections 1196 and 1197 of the Compiled Laws. The objection was not sustained, the instrument was admitted, and the court, upon hearing the proofs, adjudged that the writ be made peremptory. The cause is here by writ of error, upon a bill of exceptions, for the purpose of having reviewed the ruling of the court admitting the certificate in evidence.

The bill of exceptions does not purport to contain all the evidence received on the trial. On the contrary, it expressly appears that it contains only "all the evidence offered by the plaintiff which was objected to by the defendant," and the certificate attached to the bill shows that it is only "a true, full, and perfect transcript of such part of the record * * * as said respondent deems necessary for a review of the judgment." We will consider the question presented under two aspects: (1) Did the district court err in admitting as evidence the certificate of election? (2) Is it compe-

tent for this court, in view of the character of the record, to modify or reverse the alleged erroneous judgment?

It is admitted that the original certificate, or the one of such originals as should accompany the poll books, was not before the canvassers, for the reason that it had been purloined.

ELECTIONS: mandamus to canvass returns: evidence.

Hence the writ directed the board to proceed with the canvass of the votes from that precinct upon a certificate made in pursuance of the provisions of section 1196, Compiled Laws, 1884. That section reads: "The said judges shall close the election at six o'clock in the afternoon, and immediately thereafter shall open the ballot boxes, and publicly count the votes for each candidate, certifying the poll books as provided by law: provided, that said judges of election shall order that a copy of the certificate be entered in the poll books, then to be signed by them and clerks, and transmitted to the justice of the peace of their precinct: provided, further, that the said judges of election be required and obligated to give certified copies to the parties interested that may solicit the same: provided, that these notices shall not exceed four in number." The only grounds upon which the canvassing board objected to the reception of the certificate offered were (1) that it was not the original; (2) that it was not authenticated as required by law. The certificate purported upon its face to be the original, a duplicate thereof, or such copy as is intended by the first proviso of the foregoing section of the statute. We must take notice, from an inspection of the transcript, that the certificate of Clerk Garcia that the instrument offered was a copy of an original in his official custody was not appended thereto when it was offered. The certificate was not made until December 5, and the trial was had November 16, 1890. The certificate of election then did not, when offered, appear

to be a copy requiring authentication. The mere charge of such a defect in the language used by the objectors neither made it so, nor was it any evidence that it was such. The genuineness of the signatures thereto was not challenged, and the court may have found upon an examination thereof, or by direct proof, that it was one of the instruments authorized and made competent evidence by sections 1196 and 1197 of the Compiled Laws of the territory. "Hard cases make hard law," and this is peculiarly true in view of the many doubts, difficulties, errors, or frauds incident to popular elections. It appears upon the face of the record that the relator claimed that one hundred and fifty votes had been cast at the election in precinct number 8, of which number he had received one hundred and four, as a candidate for representative in the general assembly. Are the men who cast these votes to be disfranchised on account of the mistakes of public officers or the fraud of unknown parties, who neglected to furnish, concealed, or destroyed the primary evidence of the will of the electors as expressed by their ballots? If negligence, dishonesty, or fraud may thus nullify the right of suffrage, guaranteed to the citizen, in one precinct of the county, may not similar agencies be employed with impunity to deprive every elector of the territory of the inestimable right of a "free ballot and an honest count?" It was evidently to meet such cases, and to prevent, as far as practicable, the possibility of such wrongs, that the legislature wisely enacted the various laws providing suitable remedies in case of official negligence, and the substitution and use of copies in case of the loss or destruction of the originals. Hence, it not appearing that any proper objection was raised to the instrument when offered, we can not say, from an inspection of the bill of exceptions, that any error was committed in receiving it in evidence.

Had we not reached the foregoing conclusion, the judgment would have to be affirmed for other reasons.

VALIDITY of judgment: presumption. It is not pretended, as has been already shown, that the record contains all the evidence. In the investigation of a case of this character, it is necessary that the bill of exceptions, to entitle plaintiff in error to a reversal, should show, at least, all the evidence upon which the alleged erroneous judgment is founded. In the absence of such showing, every presumption will be indulged in favor of the validity of the judgment. *Wallace v. Boston*, 10 Mo. 660; *Hamilton v. Moore*, 4 Watts & S. Pa. 570; *Pennock v. Decalogue*, 2 Pet. (U. S.) 15. In a Tennessee case of this kind, wherein the facts and proofs are submitted to the court without a jury, all the evidence ought to be embodied in the record, and, in the absence of such showing in the bill of exceptions, the trial court is entitled to the presumption that other evidence was received of a kind sufficient to warrant the court in admitting the documentary evidence to which objection was made on the trial. This position is rendered the more reasonable because it does not appear from the record that the certificate whose reception is assigned as error was the only evidence received in support of the judgment. *Pullen v. Lane*, 4 Cold. 249; *Southern, etc., Insurance Co. v. Holcombe*, 35 Ala. 327; *Ingram v. State*, 7 Mo. 293; *Wolfe v. Hauver*, 1 Gill. (Md.) 84; *Louisville R'y Co. v. Murdock*, 82 Ind. 38.

Admitting that the certificate objected to was incompetent and improperly admitted, such error might or might not be material in the light of other evidence properly received; that is, the materiality of the error must affirmatively appear upon the face of the whole record, before an inference may be drawn that there was no competent evidence received in support of the judgment. In determining the merits of a case of this

kind, when two or more inferences are probable or reasonably possible, it is always allowable to adopt the one most favorable to the validity of the judgment assailed, and every reasonable intendment ought to be indulged in its favor, and against the party taking the exceptions. *Robin v. State*, 40 Ala. 72; *Bingham v. Abbott*, 3 Dall. (U. S.) 38; *Higgins v. Downs*, 75 Me. 346; *McReynolds v. Jones*, 30 Ala. 101; *Thompson v. Drake*, 32 Ala. 99; *Rogers v. Hall*, 3 Scam. 5. It may not always be necessary to state all the evidence in a bill of exceptions, yet in a case like the one under consideration, wherein the appellate court is called upon to review a ruling admitting evidence against objection, it is essential to set out the evidence involved sufficiently to enable the court of review to determine affirmatively that the evidence received was incompetent, and that such error was incurable. *Hackett v. Kane*, 8 Allen (Mass.), 144; *Withington v. Young*, 4 Mo. 564; *Eakman v. Sheaffer*, 48 Pa. St. 176; *King v. Kenny*, 4 Ohio, 79. In other words, it is a settled doctrine that, if a bill of exceptions does not purport to contain all the evidence, the appellate court ought to indulge every reasonable presumption that other evidence was adduced proper to sustain the judgment. *Mitchell v. Boyd*, 7 Ark. 408; *Trustees v. Lefler* 23 Ill. 90; *Frazer v. Yeatman*, 10 Mo. 501; *Redden v. Covington*, 29 Ind. 118. It follows that the judgment below must be affirmed.

LEE, FREEMAN, and McFIE, JJ., concur. SEEDS, J., having heard the case below, took no part in this hearing.

[No. 439. August 7, 1891.]

**TERRITORY OF NEW MEXICO, PLAINTIFF IN
ERROR, v. UNKNOWN OWNERS OF LAS
VEGAS GRANT, DEFENDANTS IN ERROR.**

ERROR, WRIT OF—REVIEW OF ORDER SETTING ASIDE DEFAULT.—An order of the district court setting aside a judgment by default, and permitting the defendants to plead to the declaration, is a matter within the discretion of that court, and not such an order as may be reviewed by this court, while the suit is pending there.

ERROR, from an order setting aside a judgment, by default, for plaintiff, to the Fourth Judicial District Court, San Miguel County. Writ dismissed.

The opinion states the case.

M. SALAZAR, district attorney, for the territory.

LEE, J.—This is an action on the part of the territory of New Mexico by Miguel Salazar, district attorney for the counties of Mora and San Miguel, against the unknown owners of the Las Vegas grant, in an action of debt, in which a judgment was rendered by default against the defendants in the sum of \$16,242.88, which judgment by default was subsequently, at the same term, vacated and set aside by said district court, and said cause opened up for further proceedings therein. The plaintiff excepted to the ruling of the court thereon, and brings the case by appeal from the order of the court setting aside said default, and vacating said judgment, to be reviewed by this court.

An order of the district court setting aside a judgment rendered on a default, and allowing the defendants to plead to the declaration of the plaintiffs, is a matter within the discretion of the court below, and is not such an order as may be reviewed by the supreme court while

**REVIEW of order
setting aside de-
fault.**

the suit is still pending in the district court. *McCulloch v. Dodge*, 8 Kan. 478. So far as appears from the record, this case is still pending in the district court, and has not reached such final judgment or decision as may be reviewed in this court. The writ of error will have to be dismissed, and it is so ordered.

FREEMAN, MOFIE, and SEEDS, JJ., concur.

[No. 418. August 12, 1891.]

WILLIAM N. COLER, APPELLEE, v. BOARD OF
COUNTY COMMISSIONERS OF SANTA
FE COUNTY, APPELLANT.

COUNTY BONDS IN AID OF RAILROADS—SUIT ON INTEREST COUPONS—ASSUMPSIT—EXECUTION BY BOARD—SIGNATURE OF PROBATE JUDGE—VALIDITY OF ISSUE.—In an action of assumpsit to recover the amount of overdue interest coupons on bonds of the county of Santa Fe, issued under the act of February 1, 1872, authorizing the counties of the territory to issue bonds in aid of railroads, where the bonds to which the coupons were attached were executed by the board of county commissioners after the passage of the "County Commissioners' Act" of 1876, authorizing and empowering the board to execute bonds issued under the act of 1872, *supra*, it was the act of the county in its corporate capacity, and the signature of the probate judge thereto was unnecessary, and did not affect the validity of the issue.

ID.—RATE OF INTEREST, LEGALITY OF.—Where the qualified electors of a county have fixed the rate of interest on bonds issued under the act of February 1, 1872, in aid of railroads, as provided in the second section thereof, at seven per cent, such rate so fixed is valid, especially in view of the passage of another act at the same session of the legislature abolishing usury. Chap. 19, Laws, 1872.

ID.—LIMITATION—SEC. 1863, COMP. LAWS, 1884.—Where, as in the case at bar, an action is founded on written instruments, the four years' statute of limitation does not apply. Sec. 1863, Comp. Laws.

ID.—LIMITATION—SEC. 1862, COMP. LAWS, 1884—STIPULATION—RESOLUTION OF BOARD AUTHORIZING LOAN TO PAY INTEREST.—Nor will the six years' statute of limitation (sec. 1862, Comp. Laws), apply to those coupons which matured in 1881, it having been stipulated that taxes were levied for their payment, and the board of county commissioners having recognized the interest due as a continuing liability,

before the six years could attach, by the passage of a resolution, at its regular session of June 7, 1886, authorizing such loan to be made as might be necessary to meet this interest at maturity, which was a formal official recognition of the bonds, as well as an admission of the obligation to pay the interest due on the bonds, and was provable, both as an acknowledgment and as an account stated, under the common counts; and if enough of the interest money, so levied by taxation, was misappropriated, to have paid these coupons, and the conversion occurred more than six years before the action, the defendant should have shown that fact.

ID.—STIPULATION BY ATTORNEYS AMENDATORY OF PLEADINGS.—In such case, a stipulation by the attorneys that "the pleadings, bill of particulars, and other proceedings, shall be deemed and considered as hereby amended so as to embrace the plaintiff's claim on coupons clipped from the bonds aforesaid, to the amount of \$19,915 * * * as well as the plaintiff's claim already specified in the papers on file herein, and also to conform to the facts as to the form and recitals," etc., was valid, and, on a recovery, judgment was properly entered for the amount therein stipulated.

ID.—INTEREST COUPONS, ADMISSIBILITY OF—EVIDENCE.—In a suit on interest coupons, where there was no plea denying under oath the execution of the coupons, they were admissible in evidence under the common money counts, without any further proof of their execution. Sec. 1878, Comp. Laws, 1884.

ID.—BONA FIDE HOLDER—BURDEN OF PROOF—EVIDENCE.—Where bonds were issued within the scope of a lawful power, and their recitals import the performance of all the conditions precedent, any irregularities in the exercise of the power, while they might, perhaps, have avoided the bonds as between the county and the railroad, are not available as a defense against a subsequent bona fide holder. In such case, it was incumbent on the county to show affirmatively that such holder had knowledge of the irregularities in order to avoid the securities.

ID.—NEGOTIABILITY OF, IN HANDS OF BONA FIDE HOLDER.—Where such bonds stated on their face the purpose for which they were issued, and that purpose was a lawful one, and the recitals showed a compliance with the law, they became negotiable securities, unimpeachable in the hands of bona fide holders, except for want of jurisdiction in the board of county commissioners.

ID.—STIPULATION—PRESUMPTION.—Where, in such case, it was stipulated that a certain bond "number 45" was one of the bonds from which the coupons were detached, "the said bonds being issued in several series, and all of them in form, tenor, and recitals substantially like the said bond number 45," such stipulation did not imply that the bonds of the several series were of the same date, nor that they matured at the same time. The presumption is they were legally

issued, and that, therefore, the different series were made to mature in different years, in order to be within the terms of section 1 of the act of 1872, providing that "the amount of bonds or other evidences of debt that may become due in any year shall not exceed two per centum of the assessed value of the property of the county at the time of issuing such bonds or other evidences of debt."

ID.—ASSESSMENT—EVIDENCE.—A book purporting to be the assessor's register of assessments for the year 1879, offered in evidence, containing erasures, interpolations, and alterations, and uncertified as required by law, was invalid, and incompetent to prove a valid assessment, such as would bind a bona fide purchaser for value of negotiable securities by constructive notice, nor was it conclusive of value, the county commissioners having the power to alter it, either by increasing or diminishing.

ID.—NEGOTIABLE INSTRUMENTS PAYABLE TO BEARER—PRESUMPTION. Where county bonds, regular on their face, and payable to bearer, were floated for value, and the interest coupons were produced, and admitted in evidence, in a suit to recover the interest due thereon, it was a prima facie presumption that the plaintiff was a holder of the coupons for value.

ID.—CONSTITUTIONALITY OF ACT FEBRUARY 1, 1872—BONA FIDE HOLDER—ESTOPPEL.—The legislature had the power to pass the act of February 1, 1872, authorizing the counties of the territory to issue bonds in aid of railroads, and conferring upon the counties and their officers the power to pass upon all the facts and conditions preliminary to the execution of such bonds, and where a bond, duly executed by a county, recites that it "is issued in full conformity to, and in compliance with, the statutes of the territory of New Mexico, empowering and authorizing counties to issue bonds to assist in the construction of railroads passing through all or any portion of said county," and has passed into the hands of a bona fide purchaser for value, the county is estopped from denying the validity of the bond on the ground of an overissue.

APPEAL, from a judgment in favor of plaintiff, from the First Judicial District Court, Santa Fe county. Judgment affirmed; FREEMAN, J., dissenting.

The facts are stated in the opinion of the court.

R. E. TWITCHELL, N. B. LAUGHLIN, THOMAS SMITH, NEILL B. FIELD, and GILDERSLEEVE & PRESTON for appellant.

Upon the declaration in this case, the question of the negotiability and negotiation of the coupons relied on is wholly immaterial. The plaintiff declared upon promises independent of and which were evidenced only by the coupons. *Page v. Bank of Alexandria*, 7 Wheat. 35; *Hopkins v. Orr*, 124 U. S. 513; *Throop et al. v. Sherwood*, 4 Gilm. (9 Ill.) 92; *Duran v. Rogers*, 71 Ill. 121; *Hopper v. Covington*, 118 U. S. 151; *Cotton v. New Providence*, 47 N. J. Law, 402; *Blair v. Wilson*, 28 Gratt. 165; *Buzzell v. Snell*, 25 N. H. 480; *Cilley v. Jenness*, 2 Id. 89; *Chapman v. Sloan*, 2 Id. 467; *Gamp v. Smith*, 11 Id. 48; *Morrison v. Bernards*, 36 N. J. Law, 222.

Under such a declaration it was incumbent upon the plaintiff to show compliance with every antecedent requirement from which a promise by the county of Santa Fe could be implied, or if the promises relied on were express, the power of the person or persons making such promises, to bind the county thereby. *Stout v. St. Louis Tribune Co.*, 52 Mo. 342; *Gorman v. Judge, etc.*, 27 Mich. 139; *Hannibal v. Fauntleroy*, 105 U. S. 413.

“A county or municipal corporation acts wholly under delegated authority, and can exercise no power which is not in express terms or by necessary implication conferred upon it.” *Thompson v. Lee County*, 70 U. S. 330.

If the plaintiff relied upon the proposition that the bonds and coupons were negotiable securities, and that he was a bona fide purchaser for value without notice, he should have declared specially upon the contracts, and alleged the existence of power in the county to issue such securities as well as the due execution of that power. And if he relied upon recitals in the bonds by way of estoppel he should have alleged the power and authority of the persons executing the instruments to make those recitals, and bind the county thereby.

Sheehy v. Mandeville, 7 Cranch, 215; Kennard v. Cass County, 3 Dill. 148; City v. Lamson, 9 Wall. 482; Hopper v. Covington, 10 Bin. 488.

The bonds were not negotiable securities, and the plaintiff could not have been a bona fide purchaser for value without notice, even had he filed a proper declaration, declaring specially upon the coupons, for the reasons, to wit: The bonds were signed by persons not authorized by law to execute them on behalf of the county; they bore a rate of interest in excess of the rate allowed by law; some of the bonds had coupons from July 1, 1881, extending over several years, attached at the time plaintiff acquired title to them; the bonds upon their face referred the purchaser to the act, under which they purported to have been issued. That act was notice to him of two limitations upon the power of the officers executing the bonds to bind the county, viz.: 1. That the bonds should not exceed five per cent of the assessed value of the taxable property of the county. 2. That the amount of bonds which would mature in any one year should not exceed two per centum upon such assessed valuation. The bonds contained no recital upon either proposition. School District v. Stone, 106 U. S. 185; Parkersburg v. Brown, 106 U. S. 501; Gaddis v. Richland Co., 92 Ill. 121; Green v. Dyersburg, 2 Flap. C. C. 477; Bissell v. Spring Valley Township, 110 U. S. 167; Dixon County v. Field, 111 Id. 83; Coler v. Cleburne, 131 U. S. 162; Buchanan v. Litchfield, 102 U. S. 278.

The plea of the six years' statute of limitations was well pleaded, and there was no evidence of an acknowledgment or of a new promise sufficient to avoid that plea. Daviess Co. v. Dickinson, 117 U. S. 657; Norton v. Shelby Co., 118 U. S. 426; Kelly v. Milan, 127 U. S. 139; Fort Scott v. Hickman, 112 Id. 150; Marsh v. Fulton Co., 10 Wall. 676.

The promise or acknowledgment, having been made before the bar of the statute had attached, was ineffectual for any purpose. It was not founded upon any new consideration, and our statute is silent as to the effect of a promise made before the bar of the statute has intervened. Courts can not ingraft upon a statute of limitations exceptions not contained in the statute itself. *Fairbanks v. Dawson*, 9 Cal. 90; *Wilcox v. Williams*, 5 Nev. 206; *Case v. Cushman*, 1 Pa. St. 245; *Kirk v. Williams*, 24 Fed. Rep. 446; *Perry v. Ellis*, 62 Miss. 711.

The plea of the four years' statute of limitations was well pleaded to the declaration as it stood. It could not be avoided by the replication that the action was founded on coupons or contracts in writing, which was a mere conclusion of law. The contracts declared on, not being alleged to be in writing, must, upon demurrer to the plea, be presumed to have been by parol. *Wheeler v. West*, 71 Cal. 126; *Bank of Tenn. v. Armstrong*, 12 Ark. 602; *Calvert v. Lowell*, 10 Id. 147; *Roberts v. Albright*, 2 Greene (Iowa), 120; *Hubert v. Horter*, 81 Pa. St. 39; *Lapham v. Briggs*, 27 Vt. 26; *Carpenter v. McClure*, 38 Vt. 376; *Dana v. McClure*, 39 Vt. 200; *Throop et al. v. Sherwood*, 4 Gilm. (9 Ill.) 92; 2 Greenl. Ev., sec. 127; *Mitchell v. Allen*, 28 Conn. 188; *Langford v. Frieman*, 60 Ind. 46.

It is now held that statutes of limitation are statutes of repose, and it is the duty of courts to give full effect to the legislative intent, which is to be derived solely from the language used. *Clemenston v. Williams*, 8 Cranch, 72; *Bell v. Morrison*, 1 Peters, 351; *United States v. Wilder*, 80 U. S. 254; *Kirk v. Williams*, 24 Fed. Rep. 446; *Harris v. Howard*, 56 Vt. 695.

The stipulation was not admissible in evidence—the admission of the existence of the facts therein stated was not an admission of the relevancy, competency, or materiality of such facts. By admitting such facts to

be true the parties only waived the production of legal evidence necessary to establish the existence of such facts; the question of their admissibility remained to be decided by the court as objections were interposed. *Richardson v. Musser*, 54 Cal. 196; *Welsh v. Noyes*, 10 Col. 145; *Becker v. Lamont*, 13 How. Pr. 33.

The stipulation could not confer jurisdiction upon the court to determine the liability of the county of Santa Fe upon coupons which accrued after the filing of the original declaration; it was to that extent void. *Wright v. Hart*, 44 Pa. St. 454; *Wilbanks v. Willis*, 2 Rich. (S. C.) 109; *Stabb v. A. & P. R. R.*, 3 N. M. (Gil.) 606; *State v. Turner*, 96 N. C. 416; *Etting v. Scott*, 2 Johns. 157; *Harrison v. Parker*, 5 Litt. (Ky.) 250; *Tompkins v. Ashby, Woody & W.* 32; *Bothingham v. Stevens*, 1 Hall, 379.

The stipulation was void as to such coupons for the further reason that the amendment of the pleading stipulated for was never actually made. *Ogden v. Lake View*, 121 Ill. 422; *Briggs v. Bruce*, 9 Col. 282; *Kimball v. Gerhard*, 12 Cal. 45; *Noonan v. Caledonian M. Co.*, 121 U. S. 393.

Judgment for an amount in excess of the ad damnum in the declaration was erroneous. *Safford v. Weare*, 142 Mass. 231.

The coupons are not incorporated into the pleadings so as to make it incumbent upon the defendant to deny under oath "the genuineness and due execution of the coupons." *McCormick v. Bay City*, 23 Mich. 457.

Neither the original nor a copy of any bond or coupon was filed by the plaintiff with the pleadings in which they were referred to. Secs. 1921, 1922, Comp. Laws; *Hunley v. Willis, Lang & Co.*, 5 Por. Ala. 154; *Chamberlain v. Darrington*, 4 Id. 515.

The question presented by the issue whether the bonds in amount exceed five per cent of the assessed

valuation of the taxable property of Santa Fe county, and whether an amount exceeding two per cent of the assessed value of the property of the county became due in any one year on account of the bonds issued, was a question of fact, and when a fact exists, and the party upon whom rests the burden of establishing that fact offers the best evidence, no rule of law sanctions the exclusion of such evidence. *Williams v. Amory*, 14 Mass. 30.

The mere failure to keep a record required by law to be kept, does not absolutely and in all cases exclude other proof of substantive facts "which might have been and ought to have been" recorded that might arise in the course of litigation. If a record had been kept resort can not be had to secondary evidence, except under well settled rules, but if there never was a record in existence, evidence of an inferior character may be the best evidence and be admissible. *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Otto et al. v. Tramp*, 115 Pa. St. 425; *Davis v. Smith*, 79 Me. 351; *Leathers v. Cooley*, 49 Id. 337; *Co. Com'rs v. Brewington*, 74 Ind. 7; *Gillett v. Lyon Co.*, 18 Kan. 410; *Williams v. School District*, 21 Pick. 75.

The courts are not unanimous in sustaining the absolute necessity for an assessment roll technically correct in all its parts, even in cases involving the validity of tax titles. *Tory v. Milbury*, 21 Pick. 64; *Sibley v. Smith*, 2 Mich. 499; 1 Black. Tax Tit., secs. 198, 199, and cases cited; *Greenough v. Fulton Coal Co.*, 74 Pa. St. 498; *Tweed v. Metcalf*, 4 Mich. 579; *People v. E. L. & Y. C. Co.*, 48 Cal. 144; *McClure v. Warner*, 16 Neb. 447; *Fifield v. Marinette Co.*, 62 Wis. 540; *Chestnut v. Elliot*, 61 Miss. 569; *State Auditor v. Jackson Co.*, 65 Ala. 142; *Hall v. Helmer*, 12 Neb. 87.

An assessment list is admissible in evidence, although the oath taken by the listers has not been

recorded as required by law. *Day v. Peasley*, 54 Ver. 310; *Odiorne v. Rand*, 59 N. H. 504; *Norridgworth v. Walker*, 71 Me. 181; *Lowe v. Weld*, 52 Id. 588; *Johnson v. Goodridge*, 15 Id. 31; *Bangor v. Laney*, 21 Id. 472; *Tinsley v. Rusk Co.*, 42 Tex. 40.

Alterations upon the face of an assessment list are presumed to have been made by the person having the custody thereof, or by someone in his office having authority to do so, in the absence of any evidence to the contrary. *Hommel v. Devint*, 39 Mich. 523; *State v. Manhattan Silver M. Co.*, 4 Neb. 318.

CATRON, KNAEBEL & CLANCY for appellee.

The action is upon coupons not under seal and properly laid in assumpsit. *Pana v. Bowler*, 107 U. S. 529.

The coupons, like promissory notes, and similar instruments, were admissible in evidence under the common money counts. *Johnson County v. Stark*, 24 Ill. 75, 93; *Supervisors, etc., v. Hubbard*, 45 Id. 139, 141; *Ottowa v. National Bank*, 105 U. S. 345; *Nauvoo v. Ritter*, 97 Id. 389; *Hopkins v. Orr*, 124 Id. 510.

The county having received money to the use of the plaintiff and converted the same to its own use is responsible under the common money counts for the conversion. It was competent for plaintiff to waive the tort, and sue as for money had and received. As against such a demand, the statute of limitation does not begin to run until the time of the conversion, and perhaps not until knowledge thereof is imputable to the plaintiff. *Wood on Lim.*, pp. 381, 383.

“An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action,

for which the old debt is a consideration. The plaintiff may in the latter, but not in the former, declare upon the new promise." Wood on Lim., p. 201.

Although the declaration contained only the common money counts, the action was in part essentially "founded on written instruments," and, therefore, the six years' limitation was the only limitation relevant. Comp. Laws, sec. 1862; In Supervisors, etc., v. Hubbard, 45 Ill. 139. See, also, Lyon v. Bertram, 20 How. 149, 156.

The rights of the holders of the bonds and coupons in question must be determined by the law in force at the time of the inception of such securities, and that law is to be interpreted in the light of the then current decisions of the highest courts, in the place of the contract, and not by any subsequent change of judicial decision, to the prejudice of such holders. *Louisiana v. Pilsbury*, 105 U. S. 294, 295; *Taylor v. Ypsilanti*, 105 Id. 60, 71; *Douglass v. County of Pike*, 101 Id. 677, 687; *Olcott v. Supervisors*, 16 Wall. 678; *Chicago v. Sheldon*, 9 Wall. 50, 55, 60; *The City v. Lamson*, 9 Id. 477, 485, 486; *Lee County v. Rogers*, 7 Id. 181, 184; *Thomson v. Lee County*, 3 Id. 327, 330, 331; *Havemeyer v. Iowa Co.*, Id. 294, 303; *Goelpeck v. Dubuque*, 1 Id. 175, 206; *Ohio Life Ins. Trust Co. v. Debolt*, 16 How. 431, 432; *Shelby v. Guy*, 11 Wheat. 367.

The bonds and coupons having been floated for value immediately upon their delivery by the county, every subsequent purchaser, whether he gave value or not, or whether he had notice of any infirmity or not, was clothed with the immunity of the assignor. *Cromwell v. County of Sac*, 96 U. S. 51.

Even a first purchaser for value can not be impeached as acting in bad faith merely because some of the interest accrued on the unmatured bonds is in

arrears, failure to pay interest not affecting the negotiability of that class of securities. *Cromwell v. County of Sac*, 96 U. S. 51; *Town of Thomson v. Perine*, 106 U. S. 589. See, also, *Murray v. Lardner*, 2 Wall. 110; *Goodman v. Simonds*, 20 How. 343; *Collins v. Gilbert*, 94 U. S. 753.

County bonds in aid of railroads have repeatedly been placed on the footing of negotiable securities, in respect of which the rights of bona fide holders are protected against hidden infirmities in the origin of the obligations. *Lynde v. The County*, 16 Wall. 6; *Commissioners v. January*, 94 U. S. 202; *Commissioners v. Bolles*, Id. 108; *Town of Coloma v. Eaves*, 92 Id. 484; *Carroll Co. v. Smith*, 111 Id. 556; *Co. of Warren v. Marcy*, 97 Id. 96; *Harter v. Kernochan*, 103 Id. 562. See, also, *County of Macon v. Shores*, 97 U. S. 272; *Pana v. Bowler*, 107 Id. 529; *Ottawa v. National Bank*, 105 Id. 343; *Chambers County v. Clews*, 21 Wall. 317; *Supervisors v. Schenck*, 5 Id. 772; *Mayor v. Lord*, 9 Id. 409; *Goelpeck v. Dubuque*, 1 Id. 203; *Mercer County v. Hacket*, Id. 83; *Van Hortrup v. Madison City*, Id. 291; *Meyer v. City of Muscatine*, Id. 384; *Merchants Bank v. State Bank*, 10 Id. 604; *Pendleton County v. Amy*, 11 Id. 304; *St. Joseph Township v. Rogers*, 16 Id. 644, 665; *City of Lexington v. Butler*, 14 Id. 282; *San Antonio v. Mehaffy*, 96 U. S. 312; *Ring v. County of Johnson*, 6 Iowa, 265; *Buchanan v. Litchfield*, 102 U. S. 278; *Hopper v. Covington*, 118 Id. 150; *Nauvoo v. Ritter*, 97 Id. 389.

As to distinction between cases involving a constitutional condition, and those, like ours, involving a mere statutory condition, see *Lake County v. Graham*, 130 U. S. 674.

By the revenue act of 1876, in force at the inception of the securities, the board of county commission-

ers was authorized to increase assessments made by the assessor. Prince's Laws, p. 23.

The effect of the county commissioners' act of 1876, was to make the board of county commissioners of each county the successor of the probate judge, in respect of political administrative functions. County of Kankakee v. Aetna Life Ins. Co., 106 U. S. 668; see, also, Comp. Laws, sec. 345.

It can not be set up against a bona fide holder that the amount of bonds issued was too large, in the face of the decision of the board and their recital that the bonds were issued pursuant to, and in compliance with, the act of 1872. Humboldt Township v. Long, 92 U. S. 754; Dallas County v. McKenzie, 110 Id. 686, citing Marcy v. Oswego, 92 Id. 637, and Wilson v. Salamanca, 99 Id. 504, also Humboldt Township v. Long, supra; see, also, County of Moultrie v. Savings Bank, 92 U. S. 631; Venice v. Murdock, Id. 494; Town of Coloma v. Eaves, Id. 484, 486.

The clause in section 2709, Compiled Laws, leaving blank the rate of interest on bonds, is meaningless legislation, and should be rejected. Leavitt v. Lovering, 15 Atl. Rep. (N. H.) 414; Hindekoper v. Douglass, 1 Cranch, 66; In re Water Com'rs, 66 N. Y. 414, 420, 421.

But the second section of the act (Comp. Laws, sec. 2710) provides that the proposition for railroad aid, to be submitted to the popular vote, shall specify "the rate of interest which has to be paid" conformably to the expressed intent of chapter 19 of the laws of the same session. Under a well known rule, all the laws enacted at the same session of the legislature are to be taken as speaking from the same time, as in effect parts of one statute. Sedg. Const. Stat. [2 Ed.], p. 68 citing Att'y Gen. v. Puget, 2 Price, 381; 2 Dwarris, 547.

In case of repugnancy in statutory clauses, the rule is, the last shall prevail, as showing the latest expression of the legislative will. Sedg. Const. Stat. [2 Ed.],

p. 353; 10 Wend. 547; 7 Harris (Pa.), 211; Bacon, Ab. Stat. D.; Pond v. Maddox, 38 Cal. 572; U. S. v. Stern, 5 Blatch. C. C. 512.

The contemporaneous construction of a statute by those charged with its execution is not to be disregarded except for cogent reasons, and unless it be clear that such construction is erroneous. U. S. v. Johnston, 124 U. S. 236. See, also, U. S. v. Hill, 120 Id. 169; U. S. v. Philbrick, Id. 52; U. S. v. McDaniel, 7 Pet. 1; Slidell v. Grandjean, 111 U. S. 412; U. S. v. Moore, 95 U. S. 760; Brown v. U. S., 113 Id. 568; Hahn v. U. S., 107 Id. 402; Stuart v. Laird, 1 Cranch, 299; Martin v. Hunter, 1 Wheat. 304; Cohens v. Virginia, 6 Id. 264; Edwards v. Darby, 12 Id. 210; Union Ins. Co. v. Hoge, 21 How. 35; U. S. v. Alexander, 12 Wall. 177; Peabody v. Starke, 16 Id. 240; Smythe v. Fiske, 23 Id. 374; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

The county by its repeated payments of interest, levies of taxes for that purpose, and its representations by its official records, upon the faith of which capital was induced to invest in its bonds and coupons, with the assurance that they were issued in conformity to law, is estopped from denying the validity of the issue. Third National Bank of Syracuse v. Town of Seneca Falls, 15 Fed. Rep. 783, 785; Anderson Co. Com'rs v. Beal, 113 U. S. 227; Com'rs of Johnson Co. v. January, 94 Id. 202-206; Pine Grove v. Talcott, 19 Wall. 678, 679; Whiting v. Town of Potter, 2 Fed. Rep. 517, 531; Pendleton Co. v. Amy, 13 Wall. 305; Supervisors v. Shenck, 5 Id. 772, 782; The President, etc., of Keithsburg v. Frick, 3 Ill. 405.

The pretended assessment "list," with its erasures, interpolations, and alterations, is competent for no purpose, whatever, and was properly rejected. 1 Greenl., Ev. 564; U. S. v. Linn, 1 How. 104; Angle v. N. W. M. L. I. Co., 92 U. S. 330.

The fact that it was not verified was fatal to its

admission. 1 Desty on Tax. 577, 581; Brevort v. Brooklyn, 89 N. Y. 128; Van Rensselaer v. Witbeck, 7 N. Y. 517; Westfall v. Preston, 49 Id. 349; Bellinger v. Gray, 51 Id. 610; Bradley v. Ward, 58 Id. 401; People v. Suffern, 68 Id. 321; Merritt v. Porchester, 71 Id. 309; Marsh v. Supervisors of Clark Co., 42 Wis. 502; Merriam v. Coffee, 16 Neb. 450; Morrill v. Taylor, 6 Id. 236; Cooley on Tax. 259, 289.

Attorneys of record in a pending cause have presumptively full authority to conduct the prosecution or defense according to their own discretion; and this authority includes even the right to submit the matter in controversy to arbitration. Holker v. Parker, 7 Cranch, 436; Mayor v. Foulkrod, 4 Wash. C. C. 511; see, also, Osborn v. U. S. Bank, 9 Wheat. 829; Hill v. Mendenhall, 21 Wall. 454; Pennsylvania v. Wheeling Bridge Co., 13 How. 560.

The judgment is enforceable by immediate taxation by the terms of the act out of which the securities arose. Ralls County v. U. S., 105 U. S. 733, 735, 738, and cases cited; also, Laughlin v. Co. Com'rs, 3 N. M. 421.

The county commissioners act of 1876 also makes specific provision for the collection of judgments against a county by a special levy for the purpose. Comp. Laws, sec. 338; Laughlin v. Co. Com'rs, 3 N. M. 421; Butz v. Muscatine, 8 Wall. 575; McCracken v. San Francisco, 16 Cal. 591.

As to the concluding clause providing for the execution of the judgment under the taxing power, it is merely declaratory of the applicable statutory provision, and does not, in any manner, add to the legal force and effect of the judgment. Comp. Laws, sec. 338; Laughlin v. Co. Com'rs, 3 N. M. 420.

The proper proceeding for the collection by tax of a judgment against a county is by writ of mandamus.

Ralls Co. Court v. U. S., 105 U. S. 733; East St. Louis v. Amy, 120 U. S. 600, 604.

McFIE, J.—This was a suit to recover the amount of overdue interest coupons on bonds issued by the appellant in aid of railroads. On the thirty-first of December, 1887, plaintiff filed in the district court in and for Santa Fe county a declaration containing ten counts. Nine of the ten counts were special counts in substantially the same language, and setting forth that the cause of action arose upon a large number of interest coupons, the different numbers and amounts being set forth in the several special counts, copies of the interest coupons being attached to and filed with the declaration. A demurrer was sustained to all the special counts, and the plaintiff elected to go to trial on the remaining count of the declaration, the common money count, the bill of particulars, and the stipulation as amendatory thereto. The defendant demanded the filing of a bill of particulars, and the rule was discharged by the plaintiff, by referring to the coupons on file with the declaration as a sufficient bill of particulars. The defendant filed six pleas: First, the general issue; second, plea of four years' statute of limitation; third, plea of six years' statute of limitation; and the fourth, fifth, and sixth pleas set forth substantially that the promises and undertakings alleged by the plaintiff, if any such were made, were illegal and void for want of authority in the probate judge and the county commissioners of Santa Fe county to call or hold an election for the purpose of granting aid to railroads; that the amount of the bonds issued was excessive; that the bonds bore an unauthorized rate of interest; that the county had no authority to issue or deliver the bonds; that they were not issued in accordance with the vote of the people; that the recitals did not recite the conditions upon which the bonds were

voted; and that the railroad had not been constructed. The plaintiff joined issue on the first plea; replied to the second and third, in substance, that the obligations were not barred by the statute; and to the fourth, fifth, and sixth pleas of the defendant the plaintiff replied, in substance, that the action was founded upon coupons and contracts in writing for the payment of the interest upon certain bonds which on their face purported to be bonds of the county of Santa Fe, issued in full conformity to, and compliance with, the statutes of the territory of New Mexico, authorized by the vote of the qualified electors, and that the plaintiff had purchased said coupons for a valuable consideration, and without notice of the matters alleged in the defendant's pleas. Rejoinders to each of the replications filed by the plaintiff to the defendant's fourth, fifth, and sixth pleas were filed by the defendant, but demurrers were sustained to each of them, and the defendant afterward filed amended rejoinders, in which it substantially rejoined to each of the plaintiff's said replications, that the action was not founded upon certain coupons or contracts in writing, that the plaintiff did not purchase such coupons for a valuable consideration, and denied that the plaintiff purchased the same without notice. The plaintiff joined issue.

Before proceeding to the trial of the cause, and as bearing upon the question of pleading, a stipulation was filed as follows:

“William N. Coler, Jr., v. The Board of County Commissioners of Santa Fe County. In the district court, county of Santa Fe, July term, 1889.

“It is hereby stipulated by the respective parties to the above entitled action as follows: The defendant admits that bond number 45 produced by the plaintiff, is one of the bonds from which the coupons in question

are detached, said bonds being issued in several series, and all of them in form, tenor, and recitals substantially like said bond number 45. The pleadings, bill of particulars, and other proceedings shall be deemed and considered as hereby amended so as to embrace the plaintiff's claim on coupons clipped from the bonds aforesaid, to the amount of \$19,915, of which \$4,165 matured January 1, 1888; \$5,250 matured July 1, 1888; \$5,250, January 1, 1889; and \$5,250 matured July 1, 1889, with the interest thereon from said several and respective dates of maturity, as well as the plaintiff's claim already specified in the papers on file herein, and also so as to conform to the facts as to the form and recitals of the said bonds, as hereinbefore referred to. The defendant also admits that the county of Santa Fe levied taxes for the years 1881, 1882, 1883, 1884, 1885, 1886, and 1887, expressly for the payment of the interest accruing in those years upon and according to the tenor of the bonds, to which the said coupons were attached; that such taxes amounted to \$88,579; that of the proceeds of such taxes \$36,400 were paid on account of the said interest, the said county upon such payment taking up and canceling coupons for a like amount, clipped from the said bonds; that a large sum of money, part of the proceeds of such taxation, was, by the said county, diverted from the purpose aforesaid for which it was raised and appropriated to other county purposes; that the levy of the said taxes in each of the said years is evidenced by the written records of said county, subscribed in its behalf by its county commissioners, and attested by the proper clerk; that the said bonds and attached coupons were, upon their delivery to, and acceptance by, the New Mexico & Southern Pacific Railroad Company, sold by that corporation for value, and purchased by divers persons, and in the year 1883, and from time to time

thereafter, the plaintiff acquired the said coupons and bonds for value.

“R. E. TWITCHELL, District Attorney.

“N. B. LAUGHLIN, THOMAS SMITH,

“GILDERSLEEVE & PRESTON of Counsel.

“CATRON, KNAEBEL & CLANCY,

“Plaintiff's Attorneys.”

Upon the issues thus made up the cause proceeded to trial on the sixteenth day of August, 1889. The trial resulted in a verdict for the plaintiff, under the instructions of the court, and a judgment was entered upon the verdict for the sum of \$78,395.02. To reverse this judgment the appellant brings the cause to this court.

The legislative assembly for the territory of New Mexico, in the year 1872, passed an act to encourage the building of railroads in the territory of New Mexico, and authorizing the counties of the territory to issue bonds, or other evidence of debt, to aid in the construction of railroads, and to receive stock or other securities for the benefit of such counties. The act is as follows: “Chapter 30. An act authorizing counties to aid in the construction of railroads. Be it enacted by the legislative assembly of the territory of New Mexico: Section 1. That it shall be lawful for the people of any county in this territory to pledge the credit of such county to borrow money, to issue bonds or other evidences of debt, to assist in the construction of any railroad passing through all or a portion of said county, for such amount or amounts of money, not exceeding for any such road five per centum of the assessed value of the real and personal property of such county, as the electors of said county may determine in meetings or elections that may be held in the various precincts of such county for that purpose, and at said meetings or elections the terms and conditions of such pledge of credit may also be determined as hereinafter provided, in this act. The amount of bonds or other evi-

dences [of debt] that may become due in any year shall not exceed two per centum of the assessed value of the property of such county at the time of issuing such bonds or other evidences of debt. Nor shall the rate of interest upon such bonds or other evidence of debt be more than ——— per centum per annum.

Sec. 2. It shall be the duty of the probate judge or commissioner who may be hereafter provided by law, as the case may be, to call a meeting or election of the electors of the various precincts of said county who own taxable property, upon the written or printed, or in part written or printed, request of fifteen owners of property, electors and taxpayers of such county, which request shall specify the amount which has to be raised or pledged, and the manner of raising and pledging the same by bonds or otherwise, the rate of interest which has to be paid, the time or times of the payment, and such other matters as they may consider for the welfare and security of the people of the county, and in publishing notices of the meetings or elections to be held in such county there shall also be published with such notice a copy of the request and names upon the same, for which they call the meetings or elections. The questions submitted to the electors shall be those contained in the call for the meetings or elections, and those who vote upon the question of aid shall vote a ticket upon which is written or printed, or part written and part printed, the words, 'Aid for railroads, yes;' and those who vote in the negative shall vote a ticket on which is written or printed, or part-written or printed, the words, 'Aid for railroads, no.' The elections or meetings to determine the question of aid shall be held at the usual places of voting in the precincts of the county, to be called in the same manner, at the same hours of the day the polls shall be opened, and shall be closed at the same time and manner, and the tickets shall be counted by the same inspectors and persons, and they shall make returns

of the same, certified, delivered, or returned in the same manner to all intents and purposes, as correct as is possible, as in the case of annual elections heretofore held for the election of officers, except that four notices of elections, printed in both languages, Spanish and English, shall be published at least fifteen days before the day of the election, in some conspicuous place in every and each precinct in the county, and shall be published in some periodical published in the county. Sec. 3. Should it be determined at such meetings or elections to aid in the construction of any railroad, and should it so appear from the proper returns of such meetings or elections held in such precincts as aforesaid, which returns shall be made, certified, and delivered by the proper inspectors, to the same person or persons, and in the same manner, that ordinary returns of election of county officers are certified, made, and delivered, within ten days after such meetings or elections are held, it shall be the duty of the probate judge of such county, or of any commissioner or commissioners who may by law be provided for, elected, or appointed for that purpose, to execute bonds or other evidences of debt, under their seal of office attested to by the clerk of the probate court, in conformity with the vote given at such elections or meetings of said county, and to require of the railroad company for whose benefit the aid has been voted such stock or other security for the same as can by such vote be required, as a condition precedent for the delivery of such bonds or other evidences of debt, and to do all other acts necessary to comply with the vote of the electors of such county, and all moneys, certificates, securities, or other things inuring to said county under this act, and by virtue of the conditions of such vote of said electors, shall be deposited with said probate judge or commissioners, as the case may be, and by him or them shall be kept in safety until delivered, in

conformity with the law, to the proper person at any time entitled thereto, or to the successor in office of said probate judge or commissioners as aforesaid. Sec. 4. It shall be the duty of the proper officer levying the usual taxes for territorial and county purposes, under the general law of taxation, to raise by taxation such sums of money, annually and from year to year, as may be sufficient from time to time to pay the principal and interest of such bonds or evidence of debt as regularly as the same shall become due, and in time to meet promptly the debt and interest: provided, that no bonds or other evidences of debt created under this act shall be sold for less than their par value; nor such bonds or other evidences of debt shall be paid or delivered to any railroad company, nor to any person or persons for the use of such company, nor shall they be permitted to leave the hands of said judge or commissioners, except upon the certificate of the governor that the railroad to which such aid has been conceded has been completed in the county where such aid was voted, whether it shall be entirely for such part of the county as the road has to pass, or in such proportion to all the distance agreeably to the amount of bonds or other evidences of debt delivered shall show to the whole sum voted. Sec. 5. This act shall take effect from and after its passage. Approved February 1, 1872."

In the year 1876, and prior to the issuing of the bonds and coupons in question in this case, the legislature of New Mexico passed what is known as the "County Commissioners' Act." By this act it was evidently intended that the government of the county should pass from the probate judge to the boards of county commissioners provided for by the act, and the following provisions of that act are cited in support of this view: Section 332, Comp. Laws: "Each organized county in this territory shall be a body corporate and politic, and as such shall be empowered for the following

purposes: * * * (4) To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers. (5) To exercise such other additional powers as may be specifically conferred by law." Sec. 334: "The powers of a county, as a body politic and corporate, shall be exercised by a board of county commissioners." Section 345. "The board of county commissioners shall have power at any session: * * * (2) To examine and settle all accounts of receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county, and when so settled there may be issued county orders therefor, as provided by law. * * * (5) To represent the county and have the care of the county property, and the management of the interests of the county, in all cases where no other provision is made by law. * * * (8) To grant all licenses as may be provided by law, and every officer and person now required by law to make a return or render an account to the judges of probate, except in matters pertaining to probate, shall make and render the same to the various boards of county commissioners in the manner now required by law. (9) * * * The votes cast in any election shall be canvassed and counted within the time now prescribed by law, and the said boards of commissioners shall discharge all the duties and shall exercise all the powers now exercised by the several probate judges relative to elections as now required by law, and shall be subject to the same penalties for any failure in the discharge of their duties and abuse or usurpation of power." Section 365: "All collectors, sheriffs, treasurers, clerks, constables, and all other persons responsible for money belonging to the county, shall render their accounts to settle with the board of county commissioners." * * *

The bonds from which the coupons sued on in this case were detached, were issued in professed conformity to the provisions of the act of 1872, above referred to, as modified by the provisions of the county commissioners' act of 1876. They were issued in several series. Each bond stated the number of bonds in the series of which such bond was a part. The bonds were for \$1,000 each. The bonds do not show upon their face the total amount of the entire series, nor the value assessed, or otherwise, of the property of the county of Santa Fe. Every bond contained recitals declaring it to have been issued in pursuance of the proper statute. The recitals are in the following language, viz.: "This bond is one of a series of _____ bonds, each of like tenor, date, and amount, and of like date of maturity, issued in payment of a concession of _____ thousand dollars of bonds of the county of Santa Fe, payable thirty-four years after date, to assist in the construction of a railroad by the New Mexico and Southern Pacific Railroad Company, passing through a portion of said county of Santa Fe, in the territory of New Mexico, and is issued in full conformity to and compliance with the statutes of the territory of New Mexico, empowering and authorizing counties to issue bonds to assist in the construction of railroads passing through all or any portion of said county, having been duly authorized by vote of the qualified electors who own taxable property in said county of Santa Fe, at an election duly called and held on the fourth day of October, A. D. 1879, and the governor of the territory of New Mexico having duly certified that the railroad to which such aid has been ceded has been completed in said county of Santa Fe, in full compliance with the terms of such concessions. In witness whereof, the undersigned, the probate judge and the board of county commissioners of the county of Santa Fe, in the territory of New Mexico, pursuant

to and in full compliance with the statute in such case made and provided, have signed and executed this bond, and have caused the same to be attested by the clerk of the probate court of said county, an ex officio clerk of said board of county commissioners, under the seals of said probate court and of said board of county commissioners, this ——— day of ———, 1880."

Each bond bore the county seal, and they were signed by the several county commissioners, the probate judge, and were attested by the probate clerk. It was unnecessary for the county commissioners and the probate judge to join in the execution. We are of the opinion that although at the time of the passage of the statute authorizing such bonds, only the probate judge was authorized to represent the county in the execution, yet the county commissioners' act of 1876, taken in connection with the railroad aid act of 1872, transferred the powers of the probate judge, under the last mentioned act, to the board of county commissioners. *Kankakee Co. v. Aetna Life Ins. Co.*, 106 U. S. 668. We attach no importance to the fact that the probate judge united with the county commissioners in the proceeding.

Counsel for appellant insist that the fact that the probate judge signed the bonds was of itself notice of an irregularity in their issue, sufficient to put purchasers on inquiry; but we regard such fact as suggesting only an inquiry as to why the probate judge so acted. The inquiry, if pursued, would have led only to a reading and interpretation of the statutes under which the proceedings were had, and the only inference which a purchaser could draw from the union of the several official signatures on the bonds would have been that they were employed to satisfy all the requirements of the statute in case it should be held that subsequent legislation did not divest the probate judge of his

COUNTY bonds:
execution by
board: signate
of probate
judge: validity
of issue.

former functions respecting such proceedings. The purchaser, instead of being led to conclude that the numerous signatures were suspicious circumstances, would be impressed with the evident care taken to remove objections. In carrying out the provisions of the act of 1872 by issuing bonds as therein provided for, the act of the probate judge would have been the act of the county itself in its corporate capacity; but in carrying out the provisions of that act, by issuing bonds in aid of railroads authorized by that act after the passage of the county commissioners' act of 1876, we are of the opinion that the act of the county commissioners would be the act of the county itself in its corporate capacity; and therefore, at the time the bonds to which the coupons involved in this case were attached were issued, it was not necessary for the probate judge to attach his official signature to them, but that his signature was harmless surplusage, and vitiated nothing otherwise valid.

Counsel for appellant also claim that the bonds ought not to bear seven per cent interest, but should have drawn six per cent. This claim is based on an imperfect clause in the first section of the act of 1872: "Nor shall the rate of interest upon such bonds or other evidences of debt be more than — per centum per annum."

RATE of interest,
legality of.

This clause is imperfect and meaningless, and the court can not by judicial construction fill the blank. It is unnecessary to examine the question of what, if any, significance should be given to the clause had it been the only provision concerning interest contained in the statute, for the next section clearly declares that the proposition to be submitted to the qualified electors should specify the rate of interest which is to be paid. This latter clause leaves the determination of the rate of interest to the people of the county. Here, the rule that, in case of repugnancy between statutory clauses,

the latter shall control, is of service. Following that rule, the definite clause in the second section must control the imperfect clause in the first section. This construction is also aided by the practical interpretation of the statute by the county officers for a series of years in dealing with the very bonds in question. The county, by the vote of the people, fixed seven per cent as the rate of interest, but that interest was afterward paid by taxes levied and collected during several consecutive years. Another statute, passed at the same session of the legislature as was the railroad aid act, abolished usury, and left all persons free to contract concerning the rate of interest. Chapter 19, Laws, 1872. The objection to the introduction of the coupons in evidence because they bore seven per cent interest was properly overruled. Six per cent interest only was computed upon coupons overdue.

Appellant insists that some of the coupons sued upon were barred by the statute of limitation, a matter which, if sustained, would go to the question of a reduction of the judgment. One batch of the coupons in question matured in the year 1881, more than six years before the commencement of the action; some others of the coupons matured more than four years before such commencement. The appellant pleaded both the six years' and the four years' statute of limitations, and insists that, the declaration being on the common counts only, the four years' period of the statute is applicable, and cites in support of such contention some cases in the Vermont reports. In our opinion, the action is essentially founded on written instruments, and therefore the four years' period of limitation is not applicable.

FOUR years' limitation.

The common counts in the declaration could be proven either by oral or by written promises. *Lyon v. Bertram*, 20 How. 140-156. A copy of one of the bonds was filed in the action as well as copies of the coupons,

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and these copies were also put into the case as part of the declaration by the appellee's bill of particulars. 1 Tidd, Pr., p. 599; Benedict v. Swain, 43 N. H. 34; and Nauvoo v. Ritter, 97 U. S. 391. The declaration and subsequent pleadings, read with the bill of particulars, show clearly that the coupons lay at the foundation of the action. This was the obvious, meritorious fact, and it is not to be overcome by the mere fiction of law that an implied promise was raised upon the express written promises. If the action was in one sense founded on the implied promise, it was in another sense also founded upon the underlying express promises upon which both the implied promise and the action itself were necessarily established. In Supervisors v. Hubbard, 45 Ill. 139, the common counts only were included in the declaration. The court treated the action as founded on the coupons involved. Moreover, the stipulation concedes, in effect, that the coupons lay at the foundation of the litigation. The stipulation, as well as the county's recognition of the bonds and coupons, sufficiently proves their due execution, even without resort to the statutory presumption. The coupons which matured in the year 1881 would be barred but for two reasons: First, it is stipulated that taxes were levied for the payment of those coupons; and, secondly, the board of county commissioners, before the six years' statute could attach, recognized the interest due on these bonds as a continuing liability. The county board at its regular session, June 7, 1886, passed a resolution in the following language:

“WHEREAS, it appears that there are not sufficient funds in the treasury of the county to meet the interest due on the bonds issued for the redemption of county warrants and bonds issued to the New Mexico & Southern Pacific Railroad Company, in aid of the con-

struction of the branch thereof, be it resolved, that the chairman of the county commissioners be, and he is hereby authorized to make the necessary loan in order to meet said interest when due, and said chairman is hereby authorized to issue a warrant for the payment of the interest on said loan.

“B. SELIGMAN, Chairman.

“JOHN GRAY, Clerk.”

This was a formal, official recognition of the bonds, as well as an admission of the obligation to pay the interest due on the bonds, and was provable both as an acknowledgment and as an account stated, under the common counts. The county board appears also to have admitted the accruing interest upon these county bonds at a session of the board held December 2, 1885. The county appears to have collected \$88,579, proceeds of taxation, applicable to the payment of the interest coupons on the bonds in question, in the years 1881, 1882, 1883, 1884, 1885, 1886, and 1887, and \$36,400 of the amount collected was in fact applied to the payment of the interest accruing on these bonds. Some of the interest money so levied by taxation appears to have been collected and diverted to other uses by the county. Enough appears to have been misappropriated to have paid the coupons which matured six years before the action. The precise time of such conversion does not appear in the case. If it was more than six years before the action, the appellant should have shown that fact. The amount was recoverable under the common counts, no objection being made on the trial of a variance between the proofs and the bill of particulars. It was also urged that the stipulation of the attorneys was ultra vires, and that notwithstanding the stipulation the coupons, amounting to \$19,915, which matured after the filing of the declaration, could not be considered in the case. This

objection was not made in the court below, so far as the record discloses, and is therefore not available here.

STIPULATION by attorneys, validity of. The stipulation is lawful on its face, and no application was made below for leave to withdraw it. Every presumption of authority attends the signatures of attorneys. *Osborn v. U. S. Bank*, 9 Wheat. 829; *Hill v. Mendenhall*, 21 Wall. 454. This presumption would extend to a mere voluntary appearance, and a voluntary appearance in a new action for the recovery of the payment of additional coupons would have had no higher efficacy than the stipulation entered into in the pending action. It was not necessary to interline or recopy the declaration so as to embrace the amendments. The stipulation imported an immediate amendment by force of its own terms, and the amendment, being specific in character, and not general, was perfectly regular. *Walden's Lessee v. Craig's Heirs*, 14 Pet. 147. The stipulation was admitted in evidence by the court below, and we think properly so. When it was offered, a general, but not specific, objection was made to its introduction; but an examination of the record discloses the fact that at no time during the trial of the cause was it suggested that the stipulation did not recite facts. Indeed, it was admitted by the appellant that the stipulation correctly stated facts. On page 59 of the record, Mr. Preston, one of the counsel for appellant who signed this stipulation, said: "We admit that the matters contained in the stipulation are facts, but deny that they are proper evidence." Mr. Smith, also of counsel for appellant, and who signed the stipulation, says on page 59 of the record: "We admit it to be a fact that taxes were levied for the payment of these bonds. The moment it shall be attempted to introduce that fact in evidence we will object, because we think it is immaterial. By admitting that this bond is a sample of the others, we do not admit that this bond is properly

admissible in evidence. We admit that taxes were levied, but deny that it is proper evidence." This stipulation was signed by counsel regularly employed by the county of Santa Fe, as shown by the record, and the recorded proceedings of the board of county commissioners for Santa Fe county. It was also signed by the legal representative of the county, the district attorney, and the evident purpose was to simplify the issues by the admission of existing facts; and we see no reason why the defendant should be relieved from admitting the truth and the actual facts as they existed at the time the stipulation was entered into. This stipulation was evidently intended to remove from the case technicalities, in order that the cause might be tried upon its merits; the real purpose being to determine whether the bonds of the county were valid or void. Hence the stipulation provides that the pleadings should be considered as "hereby amended" so as to embrace all the coupons due up to the time of the trial, it being immaterial to the appellant, the amount of the judgment not exceeding amount due, if the bonds and the coupons sued on were held to be valid obligations of the county. Therefore a technical examination of the pleadings in the cause seems to have been unnecessary, either in the court below or in this court. This court has already indicated its unwillingness to encourage technical objections respecting pleadings when made for the first time on appeal, after the parties have gone to trial acquiescently on an assumed issue of facts, holding that even the entire absence of a plea is immaterial, if the defendant goes to trial and controverts the plaintiff's claim by proof. We take notice of the fact that counsel who signed the stipulation in the court below are counsel in this court in this case, which, at least, suggests that counsel are not liable to the charge of having misrepresented the county in signing the stipulation. "The appearance of a regularly licensed

practitioner of a chancery court is always received as evidence of his authority, and this although he acts for a corporation." *Osborn v. U. S. Bank*, 9 Wheat. 829. "A record which shows an appearance by an attorney will bind the party until it is proven that the attorney acted without authority." *Hill v. Mendenhall*, 21 Wall. 454. "The authority of the attorney general of a state is presumed." *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 519. We see no reason why the principle in this case does not apply to the district attorney or legal representative of a county.

It is insisted by the appellant that the court erred in admitting the coupons in evidence in the court below.

We have already disposed of this objection, in so far as to hold that the coupons lay at the foundation of the action, and that the action was therefore founded upon written instruments, which may be received in evidence under the common money counts. By the pleadings, the bill of particulars, and the stipulation it is undoubted that the coupons were the real cause of action in this case. There was no plea denying under oath the execution of the instruments sued on, and hence they were admissible in evidence without any further proof of their execution, under the provisions of the Compiled Laws of New Mexico. One of the bonds was admitted in evidence, not because it was really a part of the cause of action, but it was properly admissible as furnishing the substratum on which the coupons rested. *Supervisors v. Hubbard*, 45 Ill. 141.

Proceeding, then, to the consideration of the main issue, the fundamental questions in this case are—First, whether the bonds to which the coupons sued on were attached were illegal in their inception; and, secondly, whether such illegality, if it existed, is available as a

INTEREST COUPONS: admissibility of. defense against the appellee. If the county of Santa Fe was utterly without power to issue the bonds, the bonds are bad, no matter into

BONA fide holder: burden of proof.

whose hands they may have passed. The utmost good faith could not avail a purchaser in such a case. But, if the bonds were issued within the apparent scope of a lawful power, and their recitals import the performance of all the conditions precedent, then irregularities in the exercise of the power, although they might perhaps have avoided the bonds as between the county and the railroad company, afford no defense against a subsequent bona fide holder. In such case, the county, as against one presumed by law to be a bona fide holder, must, by affirmative proof bring home to him knowledge of the irregularities in order to avoid the

NEGOTIABILITY of
bonds in hands
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holder.

securities. The bonds state on their face the purpose for which they were issued, and that purpose being a legal one, and the recitals being ample in their showing of compliance with the law, they must be considered negotiable securities, not impeachable in the hands of bona fide holders except for want of jurisdiction in the board of county commissioners. The appellant insists that upon the trial it offered to show absolute want of power in the county to issue the bonds, but was prevented from making that showing by the erroneous ruling of the trial court. The essential point made is that the county was prohibited by law from issuing bonds of the kind in question in an amount exceeding five per cent of the assessed value of the property of the county, and, on account of the terms of the stipulation of the attorneys filed in the cause, this point is supplemented by the criticism that, assuming all the bonds to be in terms like the one produced and referred to in the stipulation, they must all come due in the same year, namely, thirty-four years from date, and that thus the amount of principal payable in one year would exceed two per centum of the assessed value of the property of the county at the time of issuing the bonds, contrary to a further prohibition of the first

section of the statute. A reference to the terms of the

STIPULATION: stipulation does not sustain the latter point.
presumption.

The stipulation recites that the bond number 45 is one of the bonds from which the coupons were detached, the said bonds being issued in several series, and all of them in "form, tenor, and recitals substantially like the said bond number 45." It is not stipulated that they are dated alike, nor that they mature at the same time; it is stated that they were in several series. The presumption is that the bonds were legally issued; therefore that the different series matured in different years, so as to be within the terms of the statute. But these propositions both involve the same legal principle. If the proceedings looking to the county aid contemplated an overissue of the bonds, and no representations by recitals could protect an innocent purchaser, of course the bonds would be void, and the coupons fall with them. The real objection of the county to the payment of the bonds is found right here in the case. Great ability has been shown by counsel in pressing this subject upon the attention of the court, and we have given it great consideration. We have come to the conclusion, however, that, even were the objection that there was an overissue not otherwise untenable, the county failed at the trial to tender legal evidence of the assessed value of the property of the county at the time the bonds originated.

ASSESSMENT: evidence. It seemed to have been assumed by the counsel for the county at the trial that the assessed value to be proved was the last assessment for purposes of taxation prior to the railroad aid proceedings, and they accordingly produced what purported to be the assessor's register, or list of assessments for the year 1879; but that book contained erasures, interpolations, alterations, and was objected to on that as well as other grounds. Besides, it was not certified or verified, as required by law, at the

time. Prince, St., p. 534. If the railroad aid act referred to the last assessment for purposes of taxation, it intended a valid assessment, not a vague, unofficial, illegal document or book. An assessment is a serious thing. It exists only pursuant to law. A pretended assessment, made in defiance of law, is no assessment at all. 1 Desty, Tax'n, pp. 557-581; Cooley, Tax'n, 259-289. The book of assessments made by the assessor in the year 1879, offered on the trial below, being mutilated, and unverified or certified as required by law, was not a valid assessment, and the court was warranted in making that one of the reasons for its rejection as evidence in the case, for the reason that such a record was incompetent to prove a valid assessment, such as would bind a bona fide purchaser for value of negotiable securities, upon the principle of constructive notice, nor was it conclusive of value, as the county commissioners had power to alter it, either by increasing or diminishing. The case mainly relied on by the appellant, that of Dixon Co. v. Field, 111 U. S. 83, is based upon the theory that an assessment, such as referred to in the Nebraska constitution, is a record of which all the world has constructive notice. The court in its opinion refers to two factors present to the purchaser in that case,—one, the assessment, of which he had constructive notice by the record; the other, the extent of the county indebtedness occasioned by the bonds of which he had actual notice by the statement of the total amount of such indebtedness upon the face of each bond. The validity of the record and total amount of the assessment in that case was unquestioned, and, each bond showing upon its face the total amount of the issue, it became simply a matter of arithmetical calculation on the part of the purchaser, and which the purchaser was bound to make, to demonstrate the invalidity of the bonds. The reasoning in that case has no application to a pre-

tended assessment, unverified and uncertified, as required by law, and one which can not operate as constructive notice any better than an unlawfully recorded deed of real estate. We thus find, even if the principle of the Dixon County case could be effective under such a statute as that in question here, it could not be in the absence of proof of a lawful assessment of record. It is not to be inferred from anything said in the opinion of the court in that case, that, in the absence of constructive notice by a lawful record, a purchaser of municipal bonds, containing recitals as broad as these appearing here, is put upon inquiry as to the actual amount of taxable property in a county, and of every fact (*aliunde*) which might properly be considered by an assessor or by a board of commissioners in coming to a determination or estimate on the subject of taxable values. Such facts are proper to be considered by the county officials in forming their own conclusions as to the amount of taxable property, but the bond purchaser is not called upon to exercise his judgment upon that. This is certainly the effect of the decision in *Marcy v. Township of Oswego*, 92 U. S. 637, and in many other similar cases.

In the case of *Dixon Co. v. Field*, 111 U. S. 83, the facts are essentially different from those of the case here. The statute of Nebraska, authorizing donations to be made to railroads, authorized the issue of bonds to an amount not exceeding ten per cent of the assessed valuation of all the taxable property in the county, with the proviso requiring submission of the question of issuing bonds to a vote of the legal voters for the county in the manner provided by law. That act of the legislature was afterward amended on the seventeenth day of February, 1875, so as to require a two thirds majority of the votes cast at the election, instead of a mere majority, to authorize the issuance of bonds. It will be observed that the statute prohibi-

ted the issue of bonds exceeding in amount ten per cent of the taxable value of the property in the county. The constitution of Nebraska took effect November 1, 1875. The constitution followed the statute by authorizing donations to railroads, authorized by a vote of the electors. In its first proviso it restricted such donations to not exceeding ten per cent of the assessed valuation of such county, but in the second proviso to the constitution there was this provision: "That any city or county may, by a two thirds vote, increase such indebtedness five per cent in addition to such ten per cent; and no bonds or other evidences of indebtedness so issued shall be valid unless the same shall have indorsed thereon a certificate signed by the secretary and auditor of state, showing the same is issued pursuant to law." The county of Dixon issued bonds exceeding ten per cent of the admitted assessed valuation of the property of the county, but less than fifteen per cent; and upon the trial it was insisted that, although the statute only authorized the issuing of bonds to the extent of ten per cent of the assessed valuation of the property of Dixon county, the constitution by its second proviso had the effect of enlarging the statute by construction, and thereby legalized the issuing of bonds in excess of the limit prescribed by the statute. The court held in that case that the adoption of the constitution had no such effect, and refused to give it the construction asked for, in support of the bonds; holding that the object of the constitutional amendment was to restrict and prohibit, rather than enlarge, the powers conferred by the statute of Nebraska. In this case there is no restrictive or prohibitive constitutional provision. The powers granted the county of Santa Fe in this case were purely statutory, and this case clearly falls within the principle of the numerous cases decided by the supreme court of the United States, where bonds were issued in

professed conformity to statutory enactments. It will also be observed that in this case the statute does not restrict the county to the granting of aid or subscription for stock to one railroad.

The appellant erroneously assumes that the five per cent limit relates to the amount of aid extended to any railroad corporation, whereas the statute uses the word "railroad," cualquiera ferrocarril. The statute deals with the subject of aid to construction, or to a railroad, as aid to a definite, tangible thing in rem, rather than aid to a corporation as such. Consistently with the statute, the same corporation which had secured five per cent of aid in the construction of one road might lawfully receive aid in the construction of another road, it being plain that the statute permitted five per cent of aid to the construction of a road by one company, and, also, a like amount of aid in the construction of another road; but, on principle, it makes no difference whether the various roads are constructed by one or several companies. In either case, the county gets the benefit of the railroad improvement in increased facilities for trade and communication, increased population, and increased amount of taxable estate within its jurisdiction; which, undoubtedly, was the object sought to be obtained by the legislature in the passage of the railroad aid act. It accorded aid to the building of railroads, regardless of the owners. In the case of County Com'rs of Santa Fe Co. v. New Mexico & S. P. R. Co., 3 N. M. 120, in considering the validity of a statute of New Mexico exempting railroad property from taxation for six years after completion, Judge BRISTOL, in delivering the opinion of the court, used the following language, which we deem equally applicable to the present case, as the statute should be construed according to its intent as well as its language: "At that time the territory of New Mexico was the most inaccessible portion of the dominion of the United

States to enterprise and commerce. Every branch of industry was languishing, as it had been for centuries, for lack of cheap and rapid transportation to the leading marts of the country. To expend millions in constructing long lines of railway to and through this remote region was a hazardous undertaking; an experiment; a venture which any but the boldest minds would readily shrink from. At that date not a foot of railroad had been constructed anywhere within the borders of New Mexico. It was under this condition of things that the territory, through its legislative assembly, made a bid for railroads under fair and explicit terms, and upon a consideration of great public importance. As plainly as it could be expressed by acts of the legislative assembly the territory said to all railroad corporations then existing under the laws of the territory, or thereafter to be organized under such laws, that, in consideration of the public benefits to be derived from the construction and operation of railroads within the territory, upon the completion of any such railroad by any such corporation, its corporate property therein and connected therewith shall be exempt from taxation for six years after such completion." Again, the record discloses the reason why the bonds in this case were authorized to be issued in series, and that there were in fact several series, in that the act evidently contemplated that the bonds might be issued and delivered at different times as the construction progressed. Each bond issued bore upon its face the number of bonds in the series only, and not the entire number of bonds issued in the several series. And it may be further observed that neither of the series issued exceeded in amount the statutory limit, admitting that there was a valid record of the assessed value, and that the purchaser was chargeable with notice of that record. In this case the purchaser of one of the bonds, in any one of the series, could not ascertain

or determine, by comparing it with the assessed value of the property of the county of Santa Fe, that there had been an overissue of such bonds, or that they had not been issued in strict conformity to the law under which they professed upon their face to have been issued. There is a marked difference between this case and the case of *Dixon Co. v. Field*, in this respect. In the case of Dixon county each bond showed the entire amount of the bonds issued (\$87,000), and the purchaser, having the assessed value of the property of Dixon county in one hand, and in the other one of the bonds issued by the county, could ascertain in a moment that there had been an overissue, and consequently an absence of power in the county to issue them. The two factors in the case of Dixon county against Field were necessarily before the purchaser of the bonds, even in the open market, but the two factors were not present to the purchaser in the open market of the bonds in this case; and more especially is this true when it is admitted by the stipulation that these bonds, and the coupons attached to them, "were, upon their delivery to, and acceptance by, the New Mexico & Southern Pacific Railroad Company, sold by that corporation for value, and purchased by divers persons; and in the year 1883, and from time to time thereafter, the plaintiff acquired the said coupons and bonds for value."

It will be observed that the electors of the county were clothed with the power to determine the conditions precedent to the issuance of the bonds, except as to the result of the vote, at the election to be held; whether aid shall be given to any railroad or not, and, if so, to what extent, when payable, and the rate of interest, the points from which and to which the railroad shall be constructed, and the terms upon which the aid is granted; and, if the electors so determine, the law further declares, that it "shall be the duty of the probate judge, commissioner, or commissioners," or, in

other words, the legally constituted authorities of the county, who were clothed with the power to determine the result of the vote, to issue the aid as determined by the vote. The law further provides that the authorities of the county whose duty it was to issue the bonds, shall deliver them upon the certificate of the governor as to the completion of part or all of the road, and they shall have the power to require of the railroad company constructing the road, in consideration of the delivery of such bonds, such an amount of stock or other security as may be deemed for the welfare or security of the county. The record discloses that the propositions were submitted upon the request of fifteen owners of property, electors, and taxpayers of the county; and there appears to be no question as to the legality of the elections or the result of the vote, nor that the bonds were issued in conformity to the result of said elections, in the amount, time of payment, interest to be paid, etc. Two separate propositions, two different railroads, constructed from different points within the county, were submitted and voted upon. The certificates of the governor are shown in the record of the completion of different portions of the road, at different times; these certificates having been made evidently for the purpose of authorizing the delivery of the bonds for the portions of the road constructed. The act provided that the bonds should be delivered to the railroad company constructing the road, and, in the absence of any proof to the contrary, it must be assumed that they were so delivered; nor is it disclosed by the record that the plaintiff in this case was in any way connected with the railroad company that received the bonds, nor that he had any knowledge of the bonds or coupons in question, except such as the law imputed to him. It is a general rule that when the holder of a negotiable instrument regular on its face and payable to bearer produces it in a

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suit to recover its contents, and the same has been received in evidence, that is a prima facie presumption that he became the holder of it for value at its date, and in the usual course of business. 2 Wall. 110; 22 How. 96; 94 U. S. 753; 95 U. S. 474. "Municipal bonds payable to bearer are subject to the same rules as other negotiable paper." *Pana v. Bowler*, 107 U. S. 529. In the present case there is nothing to rebut the presumption arising from the production of the coupons, that the plaintiff was the prima facie holder of them for value. The bonds and coupons having been floated for value immediately upon their delivery by the county, every subsequent purchaser, whether or not he gave value, whether or not he had notice of any infirmity in the origin of the securities, was clothed with the immunity of his assignor; and even the first purchaser for value can not be impeached as acting mala fides, merely because some of the interest accrued on unmatured bonds is in arrears, failure to pay interest not affecting the negotiability of that class of securities. Obligations of municipalities in the form of those in suit here are placed by numerous decisions of the supreme court of the United States court on the footing of negotiable paper. *Cromwell v. County of Sac*, 96 U. S. 51.

Coupon bonds of the ordinary kind, payable to bearer, pass by delivery, and a purchaser of them in good faith is not affected by want of title in the vendor. The burden of proof on a question of such faith lies on the party who assails the possession. Possession of such paper carries the title with it to the holder. Possession and title are one and inseparable. *Murray v. Lardner*, 2 Wall. 121. The plaintiff was the bona fide holder for value of the coupons sued on in this case, and the only defense available for the appellant in this case was the absolute want of power in the corporate authority of the county of Santa Fe to issue the

bonds and the coupons involved in this suit. In *Town of Coloma v. Eaves*, 92 U. S. 484, it is held that, "where it may be gathered from the legislative enactment that the officers of the municipality are invested with the power to decide whether the condition precedent has been complied with, their recital that it has been made upon the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal," the real question involved being whether in the particular case under consideration a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and certify the existence of the facts upon which their power, by the terms of the law, was made to depend.

That there was a clear and explicit legislative enactment authorizing the county of Santa Fe to issue bonds in the aid of the construction of railroads constructed within the limits of the county, at the time the bonds and coupons involved in this case were issued, there can be no serious question. By the provisions of the railroad aid act the county itself, by a vote of its properly qualified electors, was clothed with the power to determine in what manner and to what extent aid should be given to the constructions of railroads within the county. The law provides that in the proclamations of election all of the propositions to be voted upon and determined by the electors shall be stated and published, the total amount to be issued, the time of payment, the rate of interest, the railroad to which aid is to be granted, and all other matters necessary to fully inform the elector of the matters to be determined by the vote of the people. The county itself, through its electors, determined all questions precedent to the issuing of the bonds, and it then became the duty of the corporate authorities of the county, which at that

time was the board of county commissioners, to carry out the provisions of the law, and to issue the bonds provided for by the vote of the people. The corporate authorities represent the county, and their act is the act of the county itself, to the extent of its corporate powers, and the people put in motion the machinery that compelled the corporate authorities to act, to the extent of issuing the bonds involved in this proceeding. In this way the bonds originated, and, so far as the record discloses, no effort was ever made to prevent their issuance or delivery to the railroad company, or prevent their being negotiated, and in that way they became commercial paper upon the open market. The bonds being lawful and negotiable on their face, and the appellee and the prior purchasers who bought them when they were sold by the railroad company upon their delivery to the company by the county being entitled to the presumption protecting innocent holders of commercial paper, the appellant without showing, or offering to show, that the appellee's assignors were cognizant of any irregularities, could not be permitted to prove them on the trial, unless they indicated absolute want of power in the county.

We consider the defense, and evidence in support of it, tendered by the appellant, to show the alleged want of power, to have been incompetent.

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But suppose that the rejected evidence had been admitted, how could it have helped the appellant? No constitutional limitation is involved in this case. In New Mexico it was perfectly competent for the legislature to confer upon the county and its officers the power to pass upon all the facts and conditions preliminary to the execution of the bonds. The supreme court of the United States still adheres to the doctrine of the cases of *Town of Coloma v. Eaves*, 92 U. S. 484; *Marcy v. Township of Oswego*, 92 U. S. 637; *Humboldt Tp. v. Long*, Id.

642; *Wilson v. Salamanca*, 99 U. S. 504; *Dallas Co. v. McKenzie*, 110 U. S. 680, and other similar decisions, by which it was held that the railroad aid statutes similar to the New Mexico statute conferred by implication upon the county or township officials the power to consider and adjudicate all such preliminary matters, and to recite their determination on the bonds in terms creating an estoppel against the county or municipality. The language used in the opinion of the court in *Comanche Co. v. Lewis*, 133 U. S. 206, is applicable to the recitals on the bonds in question. In that opinion Mr. Justice BREWER says: "The recital that the bond was executed and issued in pursuance of, and in accordance with, that act [the authorizing statute], and also in accordance with the vote of the majority of the qualified electors, is, within the repeated rulings of this court, sufficient to validate the bonds in the hands of a bona fide holder." In the case of *Township of Bernards v. Morrison*, decided March 3, 1890, and reported in 10 Sup. Ct. Rep. No. 17, p. 333, the court says, by Mr. Justice BREWER: "It were useless to refer to the long list of cases in which recitals like these have been held sufficient to sustain bonds in the hands of bona fide holders. While it is true that the act does not in terms say that these commissioners had the right to decide that all the preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named." In the case of *Oregon v. Jennings*, 119 U. S. 74-92, the rule is thus stated by Mr. Justice BLATCHFORD: "Within the numerous decisions of this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the corporate authorities to act for the town in issuing them to the company, were the persons intrusted with the duty of deciding, before issuing the

bonds, whether the conditions determined at the election existed, and then certify to that effect in the bonds. The town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with. Whatever may be the hardships of this particular case, to sustain the defendants would go far toward destroying the market value of municipal bonds." Several of the cases above cited expressly hold that under such statutes the defense of an overissue can not be set up against such recitals. The Dallas County Case, 110 U. S. 686, was decided almost at the same time with the Dixon county case, and it follows the prior cases on the subject, the chief justice saying that "in those cases it was expressly decided that municipal bonds were not invalid in the hands of a bona fide holder, by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue." In *Supervisors v. Schenck*, 5 Wall. 772, in giving the opinion of the court, Mr. Justice CLIFFORD says: "Argument of the defense proceeds upon the ground that, if they can show that the order for the election emanated from the wrong source, the plaintiff, although an innocent holder for value can not recover; but it is clear that in a case like the present, where the power to issue bonds was fully vested in the corporation, the proposition can not be sustained. On the contrary, it is settled law that a negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, in conformity with the provisions of its charter, is valid in the hands of a bona fide holder thereof without notice, although such security was in point of fact issued for a purpose and at a place not authorized by the charter of the corporation." In *Mayor v. Lord*, 9 Wall. 409, Mr. Justice SWAYNE said: "In that event, if the bonds could have been properly issued under any circumstances, he [an innocent purchaser] had a right

to presume they were so issued, and as against him the city is estopped to deny their validity." In *Mercer County Case*, 1 Wall. 92, 93, Mr. Justice GRIER says: "The bonds declare on their face that the faith and credit and property of the county are solemnly pledged under the authority of certain acts of the assembly, and that in pursuance of said acts the bonds were signed by the commissioners of the county. They are on their face a complete and perfect exhibit, no defect in form or substance, and the evidence offered is to show the recitals on the bonds are not true; not that no law exists to authorize their issue, but that the bonds were not made in pursuance of the acts of the assembly authorizing them." In the case of *Commissioners of Knox v. Aspinwall*, 21 How. 545, it is said that "where the bonds on their face import compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of county commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of the parties had attached, but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. These securities are treated as negotiable in the commercial usages of the civilized world, and have received the sanction of judicial recognition. Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties in issuing and obtaining these bonds, we can not agree to overrule our own decisions, and change the law to suit hard cases." In *City of Lexington v. Butler*, 14 Wall. 282, the court say: "The repeated decisions of this court have established the rule that, when a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued

under the circumstances which gave the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." In *San Antonio v. Mehaffy*, 96 U. S. 312, the court said: "The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it underdue, for a valuable consideration, and without notice of any objection to which it was liable. This shuts the door, as a matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing and making payment in the way prescribed. The rule in such case is that, if the municipality could have had the power, under any circumstances, to issue the securities, the bona fide holder has the right to presume that they were issued under the circumstances which gave the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper."

Three cases have been cited by the appellant, and apparently relied upon, in support of the proposition that the recitals do not work an estoppel. In each of the cases a constitutional limitation was involved. In the case of *Buchanan v. City of Litchfield*, 102 U. S., the bonds contained no estopping recitals, and did not even contain a statement of the purpose for which they were issued. Hence, the court said in that case that, "when a municipal bond does not bear upon its face a statement of the lawful purpose for which it was issued, or recitals estopping the municipality, it is necessary for the plaintiff, in a suit upon the bonds, or upon the interest coupons, to aver and prove that they were issued under legislative authority, and in the mode and for the purposes provided by law." The case of *Dixon Co. v. Field* we have already referred to. The third case, *Lake Co. v. Graham*, 130 U. S. 674, also involved a constitutional limitation. In the opinion of the court

it is said: "The question here is distinguishable from that in the cases relied on by the counsel for the defendant in error. In this case the standard of validity is created by the constitution. In this standard two factors are to be considered—one the amount of the assessed value; and the other the ratio between the assessed value and the debt proposed. These being the exactions of the constitution itself, it is not within the power of the legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose findings shall be taken in lieu of the facts. In the case of *Sherman Co. v. Simon*, 109 U. S. 735, and others like it, the question was one of estoppel, as against the exaction imposed by the legislature; and the holding was that the legislature, being the source of the exaction, had created a board authorized to determine whether its exaction had been complied with, and that its finding was conclusive to a bona fide purchaser. So, also, in *Oregon v. Jennings*, 119 U. S. 74, the condition violated was not one imposed by the constitution, but one fixed by the subscription contract of the people." In the case of *Potter v. Chaffee Co.*, 33 Fed. Rep. 615, Mr. Justice BREWER, in deciding the case, uses the following language with reference to the case of *Dixon Co. v. Field*: "I suppose the universal voice of the bar would affirm that the supreme court had settled beyond any question that recitals as full and complete as these estopped a county from denying the validity of the bonds in the hands of a bona fide purchaser. It has been supposed by some that this case of *Dixon Co. v. Field* has reversed prior decisions, and established a new rule. I am frank to say that I think it is quite difficult to appreciate the distinction which Mr. Justice MATTHEWS draws between that case and the case of *Marcy v. Township of Oswego*, 92 U. S. 637, but, even with the rule as laid down in *Dixon Co. v. Field*, it will not

avail the defendant in this case.” The court does not overrule the case of *Marcy v. Township of Oswego*, 92 U. S., and numerous other cases of a similar import, but distinctly says that the decision is in harmony with the decision in the case of *Marcy v. Township of Oswego*. In giving the opinion of the court in the case of *Dallas Co. v. McKenzie*, 110 U. S. (the case being decided at the same term as that of *Dixon Co. v. Field*), Mr. Chief Justice WAITE says: “In *Marcy v. Township of Oswego*, 92 U. S. 637, and *Humboldt v. Long*, Id. 642, and also in *Wilson v. Salamanca*, 99 U. S. 504, it was expressly decided that municipal bonds were not invalid in the hands of a bona fide holder by reason of their having been voted and issued in excess of the statutory limit, if the recitals imported a valid issue.

It is an admitted fact in this case that *McKenzie*, the defendant in error, is a bona fide holder for value of the coupons sued on; and the recitals, which are almost in the exact language of *Wilson v. Salamanca*, *supra*, imply authority for the issue of the bonds from which they were cut. Consequently in this case the excessive issue is no defense.” This matter of an excessive issue is the real defense in this case here. It is urged by the appellant that, by reason of an excessive issue, there was a want of power in the county of Santa Fe to issue the bonds and coupons in question in this case. It seems to us that these cases are decisive of this one. The recitals in the present case certainly imported a valid issue, and we hold the bonds to be valid on the same grounds upon which similar bonds were held valid in the cases cited. They were floated on the faith of the law, as expounded by the supreme court at the time they were issued, and that law protects them. The bonds not having been affected by any constitutional or other jurisdictional invalidity, the appellee is protected, not only by the recitals, but by the recogni-

tion of the bonds by the county as valid and subsisting securities for a long series of years. The failure to take any steps in equity or otherwise to redress any wrong done the county by their issue, or to avoid their negotiation, and the actual levy and collection of taxes for the payment of the interest from year to year, and the payment of \$36,000 of the interest upon these very securities, furnish additional grounds of estoppel, according to numerous authorities. *Anderson County Commissioners v. Beal*, 113 U. S. 227; *Supervisors v. Schenck*, 5 Wall. 772. When the bonds were issued and delivered, in pursuance of the vote of the people of Santa Fe county, a contract was entered into to which the county was a party. The object sought was obtained when the railroad to which the aid was granted was constructed and the bonds were delivered. The acquiescence shown by the appellant by its failure to take any steps to avoid the contract or the securities, or prevent their negotiation, and its recognition of the validity of the contract entered into by the issuance of bonds and the coupons attached to them, as shown by the levy and collection of the taxes for the specific purpose of paying the interest thereon, removes from this court any desire which it might, under other circumstances, have to relieve the county from its legal obligation, and upon the facts presented in this record we decline to do so. The judgment, it is true, provides for the issue of execution, but that is a mere irregularity which will not work a reversal of this case. The judgment is enforceable by tax levy as a part of the general levy, or by special levy, as already decided by this court in *Laughlin v. County of Santa Fe*, 3 N. M. (Gil.) 420, the provision for the payment of the principal and interest of the bonds as contained in the railroad act entering into the contract, and not having been repealed when the bonds were issued. *Roll County Court v. U. S.*, 105 U. S. 733. Holding that

the defense set up in this case was unavailing, and the evidence rejected in the court below was inadmissible, and therefore properly excluded, we agree with the trial judge in his ruling that the case below presented a state of facts upon which the appellee was entitled to the verdict rendered under the instructions of the court. *Armijo v. New Mexico Town Co.*, 3 N. M. 244; *Delaware & Lackawana Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569. The judgment appealed from is therefore affirmed, with costs against the appellant.

O'BRIEN, C. J., and SEEDS and LEE, JJ., concur.

FREEMAN, J. (dissenting).—I regret that I am not able to agree with the majority of the court in the conclusions reached in this important case. Failing in this, however, I do not feel at liberty to content myself with a mere dissent, without assigning any reasons therefor. I shall not attempt, however, to enter into any elaborate discussion of the questions involved. Waiving all questions growing out of the pleadings, I shall confine myself to a mere statement of my views as to the principal questions involved and decided. While this case was argued and submitted at the last term of the court, a conclusion was not reached by the majority until the meeting of the present term. In the preparation of the following dissenting opinion, therefore, I have been able to avail myself of a few hours only which could be spared from the current work of the term. I offer this as an apology for the somewhat desultory form in which my views are presented.

As I understand it, the doctrine held by a majority of the court may be stated substantially as follows: (1) Where it appears that the legislature of the territory has authorized the municipal authorities of a town or county to issue evidences of indebtedness on condi-

tions prescribed in the act, there being no constitutional limitation, and the authorities have issued such evidences of debt, reciting on the face of such instruments all the facts constituting a compliance with the terms of the enabling act, then an innocent purchaser for value of such obligations is entitled to recover the full amount, without regard to the question as to whether any or all of the conditions imposed by the legislature have been complied with. (2) That the purchaser of such bonds has only to take them in the one hand, and the enabling act in the other, and, reading them side by side, if the former on their face appear to have been issued in conformity with the latter, he need go no further in his investigations. (3) That if the legislature should authorize the officers composing the municipal authorities of the county to issue evidences of debt on certain conditions prescribed, as, for example, in pursuance of an election held for that purpose, wherein it should appear that three fourths of the qualified voters had voted in favor of such issue, and such officers should afterward issue bonds purporting on their face that they were issued in pursuance of the act of the legislature, and in pursuance of an election held under and by virtue of said act wherein three fourths of the qualified voters had voted in favor of such issue, that such pretended bonds would be valid against the county in the hands of an innocent purchaser without notice, although, as a matter of fact, no such election had ever been held, and the said board of officers had never been authorized to issue such pretended bonds, and although the bonds had been issued without either the consent or knowledge of a single qualified voter or taxpayer of the county. (4) That, to constitute a dealer in municipal bonds an innocent purchaser without notice, he has nothing to do but to see that the recitals on the bond agree with the recitals in the enabling act; that he is not affected with any infirmity, no mat-

ter what the character or extent of the infirmity may be; that, if he finds that the officers of the municipality were authorized to act under any circumstances, he has a right to assume that they acted within the scope of their authority; and that no amount or extent of abuse of that authority will affect the validity of the securities in his hands. (5) That, while absolute want of authority may be pleaded as a defense in such cases, abuse of authority can not be relied upon, unless such abuse appears on the face of the pretended bond itself. (6) That a municipal bond issued in direct violation of the law is just as valid in the hands of an innocent holder for value as a bond issued in pursuance of law, provided, always, that the fraudulent bond appears on its face to have been issued in pursuance of lawful authority. (7) That the purchaser of a municipal bond is not bound to take notice of the existence or non-existence of any fact affecting the validity of the bond, unless such fact appears on the face of the bond or in the body of the enabling act, although such fact may exist in the form of a public record, accessible to the general public. (8) That an act of the legislature authorizing the issuance of bonds in the aggregate amount of five per cent of the taxable property of the county, provided three fourths of the qualified voters at an election held for that purpose vote in favor thereof will validate the issue of bonds aggregating in amount ten, fifty, or one hundred per cent of the taxable property, the only requirement being that the bond recite on its face that it is issued in pursuance of the act of the legislature. (9) That in such cases the purchaser is not bound to take notice of the fact that the bond belongs to a series, the aggregate of which implies a confiscation of every dollar of property belonging to the people of the county, although such fact might have been ascertained by an examination of the public records of the county. (10) That such a bond

would be good in the hands of an innocent purchaser without notice of the "infirmity," although as a matter of fact no such election had in fact been held, and although as a matter of fact it had been issued without the knowledge of a single taxpayer of the county. (11) In a suit on such fraudulent bond it is no defense to show that the purchaser thereof by proper diligence might have advised himself of its fraudulent character; that nothing short of actual notice can be shown.

I do not believe that these propositions are sound, although there are many decisions of the courts which seem to give color to them. These decisions have been collated in the able opinion concurred in by a majority of the court. Some of them, I admit, go to the full extent of supporting this doctrine; but those have been, in effect, overruled by the later and better considered cases. I shall not attempt an elaborate discussion of these questions, or to review all of the authorities cited by the majority of the court in support of them. The leading case relied on to sustain this view is that of *Knox Co. v. Aspinwall*, 21 How. 544. This decision was rested upon two propositions, substantially as follows: (1) That if proper public officers, acting within the scope of their official power, issue evidences of debt, such securities are entitled to the weight of a conclusive presumption that the officers issuing them have acted in the discharge of their duty; and in the hands of an innocent purchaser for value such securities are good against the county, although they may not have been issued with authority of law. (2) That if the legislature authorizes the board of the county or other municipal officers to issue evidences of debt on the occurring of a contingency, such as the casting of a popular vote therefor, and empowers such officers, or creates a board of officers, to determine the happening of such contingency or the result of such election, then the decision of such board, unless at-

tacked in a direct proceeding, is final and binding upon the public. "The purchaser of bonds," say the court, "had a right to assume that the vote of the county which was made a precedent condition to the grant of the power had been obtained from the fact of subscription. * * * The bonds on their face import a compliance with the law. * * * The purchaser was not required to look further," etc. This decision has never in terms been overruled, but until a comparatively recent period was followed as a precedent. I say that it has never in terms been overruled, but it has been worn away by the attrition of popular judicial discontent, until there remains now not a vestige of the first proposition. Let us see if this latter statement is not only substantially, but literally, correct. Suppose a board of rascally county commissioners should get together, and without any authority whatever issue county bonds, reciting merely on such bonds that they were issued by virtue of lawful authority, etc., there is not a respectable court anywhere that would hold that the county might not defend in a suit brought to collect such bonds, by showing that the commissioners were not authorized by law to issue such bonds; and yet that is precisely what the supreme court in the Aspinwall case said could not be done. I speak reverently, and with great respect, when I say that this case is an illustration of the rule that no man can rise above error, and of the danger of accepting any proposition literally as a precedent. A long line of decisions follow this as a precedent. It was long the custom to refer to the Aspinwall as a well considered case, and yet it was left for Justice MILLER, in his masterly dissenting opinion in the case of Humboldt Tp. v. Long et al., 92 U. S. 646, to bring prominently into notice for the first time the fact that Justice NELSON in the Aspinwall case supported his opinion by an erroneous conception of the doctrine laid down in the

case of *Royal British Bank v. Turquand*, 6 El. & Bl. 327.

Speaking on this point, Justice MILLER said: "The original case on which this ruling [that county bonds, though issued without authority of law, may still be collected] is based is *Knox Co. v. Aspinwall*, 21 How. 539. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now (1875); it has simply been followed. The case of *Town of Coloma v. Eaves*, super, 484, decided a few days ago, is the first attempt to defend it on principle that has been made. How far that has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of *Royal British Bank v. Turquand*, on the authority of which *Knox Co. v. Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision. The bank in that case was not a corporation. It was a joint stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended, in this particular case, on a resolution of the company. The charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient. That was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records, made and kept by officers of the law for that very purpose. In all these material circumstances, that case differed widely from those now before us."

It occurs to me that much of the confusion and many of the contradictions that have grown out of the construction given to the power of municipal officers to bind the people by recitals on bonds issued by such officers have grown out of a failure to discriminate between those facts the existence of which must be ascertained by such officers and those facts the existence of which is, or may be, known to all men. When such officers are authorized to issue bonds on certain conditions, as, for example, on the application of a given number of taxpayers, or on a certain result of an election, the power to determine when the condition exists, or the event has occurred, or the contingency has "happened," must be lodged in some officer or board of officers; and the determination of such officers or board, unless attacked by a proper proceeding, must be accepted as conclusive evidence of such fact; it is a final determination of the matter properly submitted, and can not be questioned collaterally. A different rule controls, however, in the ascertainment of a pre-existent or coexistent fact; a fact that exists independently of any action; a fact that does not depend upon a contingency; one that does not depend upon the "happening" of an event such as the result of an election. When, therefore, the act authorizing the issuance of bonds limits the amount issued to a certain per cent of the taxable property, it seems to me that the limitation is an element of the authority to act, and that a disregard of this limitation vitiates the action of the board. The reason given, why the recitals on the bond that the conditions necessary to its validity have been kept is conclusive of that fact, is that these conditions, or the result of these contingencies, or the happening of these events, are peculiarly within the knowledge of the party or parties authorized to make the recital. "The persons appointed to decide whether the necessary prerequisites to their issue had been com-

pleted have decided, and certified their decision. They have declared the contingency to have happened, on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a bona fide purchaser is not required to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by law confided to others,—to those most competent to decide it,—and which the purchaser is, in general, in no condition to decide for himself.” *Town of Coloma v. Eaves*, 92 U. S. 490.

But the amount of taxable property within a county is not “an event” or a “contingency.” It is an independent fact, the ascertainment of which is within the reach of every one. It is a fact disclosed by record, open to the inspection of all. In the case under consideration, the appellant offered to show that the issue of bonds in controversy was in excess of the amount authorized by the act of the legislature, but he was not allowed to make that proof. Under the well recognized rule of pleading, this is an admission of the fact that the issue of the bonds was excessive. Various objections were made at the trial to the introduction of evidence to show that the issue of bonds was excessive. Everything in the shape of record was offered and rejected. The appellant then proposed to show by taxpayers themselves that the issue was excessive; so that it was not the character of the proof offered, but the character of the thing to be proven, that was objected to. The ruling of the court below, as appears by the record, was to the effect that the amount of taxable property in the county was an immaterial matter, and could not, therefore, be shown by any character of proof. It is said, however, that this is no longer an

open question; that the supreme court of the United States has held that an overissue of bonds can not be shown by the county as a defense against recovery, unless such overissue is in violation of a constitutional limitation; and, as there is no such authority in this territory as a constitution (unless the enabling act may be termed a constitution), that, therefore, county and municipal corporations are not subject to the control of any higher power in this regard. I admit the force of this contention. It is something more than ingenious; it is plausible; but to my mind it is unsatisfactory. It is unsatisfactory, because it involves the corollary that a municipal corporation created by the legislature, drawing all its powers from that body, may do, not only what it is not authorized to do, but that which it was absolutely forbidden to do.

In view of the great reliance placed upon the doctrine that the county is, by the action of the board of commissioners and the recital on its bonds, estopped from setting up the defense of overissue, it is interesting, if not instructive, to inquire how this doctrine found its way into our decisions. The first decision of the supreme court, so far as I can ascertain, which undertakes to give a reason why an overissue does not invalidate the bonds, is that of Humboldt Township v. Long et al., 92 U. S., and the reasoning is found at the bottom of page 645. Omitting the reasons given, the court cites *Marcy v. Township Oswego*, 637, of the same book, as authority for the rule. Now, if we turn to the case last cited, we shall find that the question of overissue was the only matter before the court. It was admitted that the bonds were issued in strict compliance with the act of the legislature, unless they were voted and issued in excess of the amount authorized by the act. It was shown that the recitals on the bonds were to the effect that they were issued in accordance with the act; that the bonds were regis-

tered, etc. Justice STRONG, after reciting the facts in the case, said: "In view of these facts, and of the decisions heretofore made by this court, the first question certified to us can not be considered an open one. We have recently reviewed the subject in *Town of Coloma v. Eaves*, supra, page 484, and reassert what had been decided before," etc. Here it will be observed that the court refers to decisions "heretofore made by this court," and particularly to the case of *Town of Coloma v. Eaves*, supra, 484. Turning, now, to the case last cited, as authority for this proposition, we find that the question of overissue was not even remotely involved. The only question involved was as to the validity of the election, which was attacked on the ground of a want of legal and proper notice. The syllabus in that case is taken from the body of the opinion, and is in the exact words of Justice STRONG, who delivered the opinion of the court. I shall presently give this syllabus in full, and that for the important consideration that it is a very carefully prepared statement of the rule as laid down by Justice STRONG himself. On page 491 of the book, after reciting the rule laid down by Judge DILLON, and criticising it as a "very cautious statement of the doctrine," he states the rule as follows: "Where the legislative authority has been given to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent had been complied with, their recital that it has been made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal."

Now, with great respect, I submit that this rule fails to sustain the doctrine that an overissue can not be shown as a defense. In the case under consideration the amount authorized to be issued was limited to five per cent of the taxable property. In what sense, "may it be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide" as to the amount of taxable property in the county, so that their decision should become "conclusive of the fact, and binding upon the municipality?" In what possible sense is the amount of taxable property a "contingency" or an "event," the "happening" of which is to be certified to, or a condition precedent "that has been complied with?" I submit, therefore, that this pernicious doctrine that, under authority of an act of the legislature authorizing them to issue bonds to the extent of five per cent of the taxable property of the county, the board of county commissioners may bind the county in an unlimited issue,—may bankrupt and ruin the county by an overissue,—is, like the kindred doctrine laid down in the *Aspinwall* case, that the recital of the officers themselves that the bonds were issued in accordance with the law was binding upon the county in the absence of lawful authority, a parasite that has grown out of the misconstruction of the rule laid down in *Town of Coloma v. Eaves*, 92 U. S. 492, just as the *Aspinwall* case was the result of the misconstruction of the English case of *Royal British Bank v. Turquand*, 6 El. & Bl. 327.

The doctrine of estoppel by recitals had its origin and owes its existence to the consideration that the recitals are made by the parties who are by law vested with the means to determine, and the authority to announce, the performance of the condition or the happening of the contingency upon which the authority for the issuance of the bonds is made to depend, "and

this is more emphatically true when the fact is peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted." *Marcy v. Township Oswego*, 92 U. S. 639. If an unlimited overissue will not in any event, except in the case of constitutional limitations, affect the validity of the transaction, then these county officers are invested with the power of confiscation, and this power is given by construction merely,—a construction drawn from the case of *Marcy v. Oswego Township*, which was itself a construction of a former decision, which rested the doctrine on a still earlier case, wherein the question did not arise.

I assert with great respect that this extraordinary doctrine that a board of county commissioners supposed to be the creatures of the law and servants of the people may, under authority of a law authorizing them to issue bonds to the amount of five per cent, bind the people to the payment of fifty per cent, has never been upheld by the supreme court, as a matter of first impression. I have already adverted to the doctrine that recitals, to be regarded as estoppels, should be confined strictly to the matters intrusted solely to the officers whose recitals are relied upon. In view of the extraordinary results reached by the attempted application of the doctrine of estoppel by recitals, the views of the supreme court as laid down in *Northern Bank v. Porter Tp.*, 110 U. S. 614, et seq., are instructive. I quote: "It is, however, contended that by the settled doctrines of this court the township is estopped, by the recitals of the bonds in suit, to make its present defense. The bonds, upon their face, purport to have been issued 'in pursuance of the provisions of the several acts of the general assembly of the state of Ohio, and of a vote of the qualified electors in said township of Porter, taken in pursuance thereof.' These recitals, counsel argue, import a compliance, in all respects, with the law; and

therefore the township will not be allowed, against a bona fide holder for value, to say that the circumstances did not exist which authorized it to issue the bonds. It is not to be denied that there are general expressions in some former opinions which, apart from their special facts, would seem to afford support to this proposition in the general terms in which it is presented. But this court said in *Cohens v. Virginia*, 6 Wheat. 399, and again in *Carroll v. Lessee*, 16 How. 287, that it was 'a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.' 'An examination of the cases in which those general expressions are found will show that the court has never intended to adjudge that mere recitals by the officers of a municipal corporation in bonds issued in aid of a railroad corporation preclude an inquiry, even where the rights of a bona fide holder were involved, as to the existence of legislative authority to issue them.' A reference to a few of the adjudged cases will serve to illustrate the rule which has controlled the cases involving the validity of municipal bonds. In *Knox Co. v. Aspinwall*, 21 How. 542, 62 U. S. XVI. 209, power was given to county commissioners to subscribe stock to be paid for by county bonds, in aid of a railroad corporation, the power to be exercised if the electors, at an election duly called, should approve the subscription. It was adjudged that, as the power existed, and since the statute committed to the board of commissioners authority to decide whether the election was properly held, and whether the subscription was approved by a majority of the electors, the recital in bonds executed by those commissioners, that they were issued in pursuance of the statute giving the power,

estopped the county from alleging or proving, to the prejudice of a bona fide holder, that requisite notices of the election had not been given. In *Bissell v. Jeffersonville*, 24 How. 299, the court found that there was power to issue the bonds, and that after they were issued and delivered to the railroad company it was too late, as against a bona fide holder, to call in question the determination of the facts which the law prescribed as the basis of the exercise of the power granted, and which the city authorities were authorized and required to determine before bonds were issued. Probably the fullest statement of the settled doctrine of this court is found in *Coloma v. Eaves*, 92 U. S. 491. In that case the authority to make the subscription was made by the statute to depend upon the result of the submission of the question to a popular vote, and its approval by a majority of the legal votes cast. But whether the statute in these particulars was complied with was left to the decision of certain persons who held official relations with the municipality in whose behalf the proposed subscription was to be made. It was in reference to such a case that the court said: 'When legislative authority has been given to a municipality or to its officers to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' This doctrine was reaffirmed in *Buchanan v. Litchfield*, 102 U. S. 290, and in other cases, and we perceive no just ground to

doubt its correctness, or to regard it as now open to question in this court. But we are of opinion that the rule as thus stated does not support the position which counsel for plaintiff in error take in the present case. The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation, issuing bonds in aid of the construction of a railroad, was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued; not merely for themselves, as the ground of their own action in issuing the bonds, but equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it."

The majority of the court give great weight to what appears to be the bona fides of the several transactions out of which this litigation has arisen. The appellee is represented as a bona fide purchaser without notice, etc., and the contention is that the bonds were issued in different series, so that it would be impossible for the purchaser to ascertain from the recital the amount issued, or the amount of taxable property of the county. And the further fact that these bonds were made payable to bearer is relied on to bring them within the rule applicable to ordinary commercial paper, to the extent that their possession implies the presence of all the conditions necessary to a recovery. This seemingly equitable view of the question is discussed in the case of *Marsh v. Fulton Co.*, 10 Wall. 676. The facts in that case were substantially these: Under authority of the act of the legislature, the county had voted aid to the Mississippi & Wabash Railroad

Company. The legislature afterward changed the charter of the company by dividing the road into three sections. Thereafter the board of supervisors, in pursuance of the power conferred upon the board by an election, proceeded to enter the subscription of stock on the books of the "Central Division of the Mississippi & Wabash Railroad Company," and issued bonds payable to that company or bearer. Afterward, interest was paid on these bonds. County agents were appointed to attend at the meeting of stockholders, which agents voted for the officers of the company, and in various ways the county recognized the validity of the bonds. It would appear that if by any possibility the holder of a bond could acquire, by mere force of equity, a right to insist upon the payment of his bond, this case would afford an illustration of the rule. The legislature had authorized the county to issue the bonds; the line of road sought to be aided had been laid out; the road had been built; the bonds had been issued; the interest had been paid; county officers had been allowed to control in part the operations of the road. No other irregularity intervened, except that the road was divided into three divisions. In the case at bar the legislature had authorized the county to vote aid to any railroad, limiting the amount of aid to five per cent of the amount of taxable property. The bonds under consideration had been issued as the result of two elections held on the same day, or what was in reality one election, at which a proposition was agreed to extending county aid to a single railroad company. The manner of calling and holding this election, the division of the propositions so as to appear to keep within the limitations of the act, was a palpable evasion of the well known limitations imposed by the act, under which the county proposed to act, and the purchaser of the bonds in question must have obtained them with a knowledge of this evasion. In the case,

however, to which I have just referred, no such effort at evasion appears to have occurred, and yet the supreme court in the suit brought against the county on one of these bonds held that the plaintiff could not recover. The following is taken from the opinion of the court: "But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact, we do not perceive how it could affect the liability of the county of Fulton. This is not a case where the party executing the instruments possessed a general capacity to contract, and where the instruments might not for such reason be taken without special inquiry into their validity. It is a case where the power to contract never existed,—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county, and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd's Acceptances, ante. In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued.' "

It is insisted by the majority that great weight ought to be given to the presumption that the appellee was an innocent purchaser for value, without notice of any infirmity attending the issue of these bonds, and attention is directed to the fact that the bonds were issued in such series, and were so indefinite in their recitals, as to render it impossible for the purchaser upon inspection, to determine by such inspection that they were issued in violation of law. I am not able to agree with this conclusion. On the contrary, it appears to me that these very facts were suspicious circumstances that ought to have put the purchaser upon inquiry. The fact that two elections were held on the same day, at the same hour and the same place; that at these two elections were submitted two propositions, authorizing the issuance of two amounts of bonds to the same corporation,—is of itself a circumstance that ought to have put the purchaser upon inquiry. It has been repeatedly held that when an intended purchaser is put upon inquiry he must follow out that inquiry by all the means reasonably within his reach. He knew that these bonds were issued by public officers; that these officers were acting under a limited authority; he knew that they had no authority to bond the county beyond the sum of five per cent of the taxable property. He had access to the assessment rolls. He could have ascertained that the sum of the bonds proposed to be issued was largely in excess of the amount authorized; and this fact would have advised him of the fraudulent process by which the officers of the county sought to avoid the limitations imposed upon them by the legislature. In a long line of decisions sustaining the validity of illegally issued bonds, it was the avowed purpose of the court to maintain the public credit of municipalities, but, behind this bulwark erected by the supreme court for a purpose so admirable, the most flagrant schemes of public plunder sought shelter. The

dishonest speculator in public securities had but to conspire with dishonest county officers to procure the issue of fraudulent county bonds, which should contain on their face the fatal "recital" that they were issued in pursuance of a certain statute, and the work of plunder, the graceless theft, was accomplished.

That it may appear that this statement is correct, let the record speak. In the case of *Comanche Co. v. Lewis*, 133 U. S. 201, 10 Sup. Ct. Rep. 286, the county which it was sought to plunder was organized, as it was admitted of record, "solely for purposes of plunder, by a set of men intending to secure a de facto organization, and issue the bonds of said county, register and sell them to distant purchasers ignorant of the facts, and enrich the schemers, while plundering the future inhabitants and taxpayers of the counties; and upon the consummation of said scheme, in the spring or early summer of 1874, all of said schemers, together with those who were the said de facto officers of the said county, left said county, and never returned, and said county remained with said organization, totally abandoned, until in February, 1885, when said county was, upon memorial presented and census taken, organized as in cases of unorganized counties." Here a large and uninhabited section of the state was, twelve years prior to its legal organization as a county, incumbered with a debt that its future inhabitants must pay, for the bonds were held to be valid. I can not but regard this decision as the greatest possible tribute paid by a great tribunal to the doctrine of stare decisis. The reasons and arguments adduced in support of the decision demand and receive our highest respect, because they emanate from that great tribunal, our supreme court, but I seriously doubt if any fairminded lawyer ever contemplated the result with entire satisfaction.

I shall conclude what I have to say on this branch of the case by quotation from the dissenting opinion of

Justice MILLER in the case of Humboldt Tp. v. Long et al., already referred to: "The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is that, wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and especially and particularly if they make a false recital of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it." With great deference, and with some hesitation, I have ventured the foregoing discussion of this question, and have indulged in comment upon the decisions of the supreme court of the United States. I am not to be reminded that the decisions of that court are binding upon this, nor that it would be a palpable violation of every element of good taste and proper decorum for a member of this court, or for the court itself, to question the authority of these decisions. Such is not my purpose. I propose to demonstrate, if I can, the proposition that the conclusion I have reached in the case under consideration is in harmony with the later decisions of the supreme court.

Before proceeding, however, I desire to advert briefly to another feature of this case. It has been sought to bind the county, not only by the recitals on the bond, but by an agreement entered into between the attorneys for the appellant and those of the appellee, and offered and received in evidence in the court below. Much importance has been attached to this agreement, which may be found on page 76 of the record. I can not accept the construction given to it by the majority

of the court. It is an admission as to matters of fact made by the attorneys for the appellant. If at the time this admission was made it was intended to have the effect contended for by the appellee, and agreed to by a majority of the court, then it was a fraud practiced upon the people of this county by the attorneys for the appellant, and ought not to be allowed to stand. Under this pretended agreement, the appellee was allowed to take a judgment for a large amount, confessedly not due at the date of the institution of the suit. I shall not enter into a discussion of the question as to how far a client is bound by the admissions of his attorney. It seems to me that in this case a proper distinction has not been observed between the authority of an attorney representing a municipal corporation and one representing a private corporation or individual. In this as in other branches of this case the majority have not given due consideration to the fact that the only real parties interested are the complainant on the one side and the taxpayers on the other. The men who employed these attorneys who made these admissions of record were themselves but the agents of the real parties in interest. It is too clear for argument that an attorney employed by the officers of a municipal corporation to protect the rights of the taxpayers of such municipality has no authority to go into court, and confess judgment against his clients. The county commissioners themselves had no authority to do anything or to take any steps that would validate these bonds. Ordinarily the principal is bound by the acts of his agent, if such agent act within the scope of his authority; but it must be borne in mind that these attorneys were themselves but the agents of agents. They were the servants of the commissioners, who were in turn the servants of the public. "It is not, in our opinion, competent for the authorities of a town to agree that its void bonds shall be made valid by putting that

agreement in the form of a judicial decree." Kelly v. Town of Milan, 21 Fed. Rep. 869. In the same case it is further said: "In a case like that we are now considering, an agreement that would impose, without legislative authority, a tax upon the citizens of the municipality to pay bonds that were void, is itself a fraud, no matter how well intentioned, or how much the parties believed in their power to make it." The opinion in this case was rendered by Judge HAMMOND, and concurred in fully by Associate Justice MATTHEWS of the supreme court. I do not mean to impute to the attorneys in this case any fraudulent purpose. On the contrary, it was insisted by them in the court below that such was not a proper construction of the stipulation, and they earnestly protested against allowing the stipulation, with this construction, to go to the jury. Record, p. 59.

I have endeavored to give respectful consideration to the numerous decisions of the supreme court cited by the majority of the court in support of the propositions sought to be maintained. I have endeavored to show that one of the most dangerous features of this doctrine of "estoppel by recitals" found its way into an early decision of the court by inadvertence. The doctrine that a county officer can bind the people of the county by a mere recital, while it has never been overruled, is not now regarded as the law. I am now about to show that not only has this feature of the Aspinwall case been allowed to fall into disuse, but that other propositions contained in that decision, and supported by such an array of authorities as has been presented by the majority of the court in this case, have, in effect, been overruled by later decisions of the supreme court. I say, in effect, for they, I admit, have not been overruled in express terms; but the doctrine laid down by that court in the case of Dixon County v. Field, to which I shall presently advert, is so absolutely incon-

sistent with the doctrine of the case of *Knox County v. Aspinwall*, as to render it as thoroughly impossible that both should be the law as that daylight and darkness should exist at the same hour and the same place.

In the case of *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, the question was again before the supreme court of the United States. I shall offer no apology for quoting somewhat in extenso from the opinion of the court in this case. The facts upon which the opinion was rendered were substantially as follows, as found by the court: The party bringing the suit against the county was an innocent holder for value of coupons sued on, and of the bonds to which they belonged. The bonds were executed in proper form, under the seal of the county, and were issued as a donation to a railroad company. Each bond contained the recital that it was issued under and in pursuance of the order of the county commissioners of the county of Dixon, state of Nebraska, and that the issue was authorized by an election held in said county under and by virtue of a general statute of the said state of Nebraska, which statute was referred to and set out. On the back of each bond was the certificate of the county clerk, reciting that this issue of bonds was the only one ever made by the county; that the question of issuing them was submitted to the county by resolution of the county commissioners, etc. There was also indorsed on each bond the certificate of the secretary and auditor of the state of Nebraska, reciting that it was issued in pursuance of law, etc. Justice MATTHEWS, in delivering the opinion of the court, wherein it was decided that the county was not chargeable, said: "Recurring, then, to a consideration of the recitals in the bonds, we assume, for the purpose of this argument, that they are, in legal effect, equivalent to a representation or warranty or certificate on the part of the county.

officers that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise, it would always be within the power of a municipal body to which power was denied to usurp the forbidden authority by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself. And the estoppel does not arise except on matters of fact which the corporate officers had authority by law to determine and to certify. It is not necessary, it is true, that the recitals should enumerate each particular fact essential to the existence of the obligation. A general statement that the bonds had been issued in conformity with the law will suffice, so as to embrace every fact which the officers making the statement are authorized to determine and certify. A determination and statement as to the whole series, where more than one is involved, is a determination and certificate as to each essential particular. But it still remains that there must be authority vested in the officers by law as to each necessary fact, whether enumerated or nonenumerated, to ascertain and determine its existence, and to guaranty to those dealing with them the truth and conclusiveness of their admissions. In such a case, the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment

and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency.

This becomes very plain when we suppose the case on such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect. So, if a fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all depended upon the actual objective existence of the requisite fact as shown by the record, and not upon its ascertainment and determination by anyone; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument. This principle is the essence of the rule declared upon this point by this court, in the well considered words of Mr. Justice STRONG in *Town of Coloma v. Eaves*, 92 U. S. 484, where he states (page 491) that it is 'where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with' that 'their recital that it has been made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.' The converse is embraced in the

proposition, and is equally true. If the officers authorized to issue bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel claimed to arise upon the recitals in the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. The very ground in the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject. This is the rule which has been constantly applied by this court in the numerous cases in which it has been involved. The differences in the result of the judgments have depended upon the question whether in the particular case under consideration a fair construction of the law authorized the officers issuing the bonds to ascertain, determine, and certify the existence of the facts upon which the power, by the terms of the law, was made to depend; not including, of course, that class of cases in which the controversy is related, not to conditions precedent, on which the right to act at all depended, but upon conditions affecting only the mode of exercising a power admitted to have come into being. *Marcy v. Oswego*, 92 U. S. 637; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Clark*, 94 U. S. 278; *County of Warren v. Marcy*, 97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704. In the present case there was no power at all conferred to issue bonds in excess of an amount equal to ten per cent upon the assessed valuation of the taxable property in the county. In determining the limit of power, there were necessarily two factors—the amount of the whole bonds to be issued,

and the amount of the assessed value of the property for purposes of taxation. The amount of the bonds issued was known. It is stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions and the performance of their duties, but the information is for themselves alone. All the world besides must have it from the same source and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic and proves itself by inspection, and concludes all determinations that contradict it."

The doctrine laid down in this case was afterward adopted and approved in the case of *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. Rep. 651; also in the case of *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. Rep. 654. I am aware that the distinction drawn by the court between the three cases last cited and the cases cited by the majority of the court, wherein

the recitals have been held to operate as an estoppel on the county, is that the doctrine in the latter was applied to the cases of bonds issued in contravention of statutory restrictions, whereas in the former the restriction was constitutional. I admit that the distinction exists, but, whatever may be the force of its application, it can not destroy or impair the truth of the proposition settled in a long line of decisions reaffirmed in the Dixon county case, that the recital of the officer, in order to constitute it an estoppel, must be confined to such matter as is committed alone to his charge. It will be observed that the only cases in which the supreme court has determined that the recitals contained in the bond are to be regarded as estoppels are those in which the people of the particular state have chosen to commit the whole question to the legislature, and have not undertaken to restrict the legislature by any constitutional enactment. The decisions proceeded upon the ground that, the legislature being thus unrestricted by any constitutional limitation, and having committed the authority to act in this regard to the board of county officers, the people are bound by such action. In the case at bar there is a distinction which in my mind relieves the court from the operation of this rule. In this case is involved the right of a municipality created by the territorial legislature to violate the terms imposed by an act of the legislature. Here we have no constitution, the enabling act being sometimes called a constitution. It serves many of the purposes of a constitution, but it is nevertheless not a constitution. A constitution is the highest form of organic power erected by the people, who are themselves the subjects of that power. On the contrary, the people of the territory had no voice or hand in the matter of creating the organic act. Whatever of sovereignty may reside in the people of the territory is represented by

the legislature. It is the highest branch of organized local authority. If a corporation created by the legislature may violate the charter of its existence, there is no power on earth interested in its affairs which can control its operation. The people of this territory can not call a constitutional convention for the purpose of imposing limitations upon the power of the legislature, or the power of municipal corporations. It follows, therefore, that if the municipalities may openly violate acts of limitation passed by the legislature, there remains to the people but one escape from their absolute control, and that is by means of destroying them altogether. It is not my purpose to go into any elaborate discussion of the distinction between the powers of the territory and those of the state. "A territory, under the constitution and laws of the United States, is an inchoate state—a portion of the country not included within the limits of the United States, and not yet admitted as a state into the United States, but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers, appointed by the president and senate of the United States." *Ex parte Morgan*, 20 Fed. Rep. 305. "The territorial status is one of pupilage, at best, and may include the mere child as well as the adolescent youth." *Nelson v. U. S.*, 30 Fed. Rep. 115. In the case of *Clinton v. Engelbrecht*, 13 Wall. 443, it was said: "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of the United States." So, also, in the case of *Hornbuckle v. Toombs*, 18 Wall. 655, it was said: "The powers thus exercised by the legislature are nearly as extensive as those exercised by state legislatures." Thus it will be seen that, wherever reference is made to terri-

torial governments by comparison they are represented as exercising prerogatives inferior to those conferred upon the state.

It may be said that the distinction drawn between the power of the territorial legislature and that of the state legislature is more technical than substantial; but I respectfully suggest that it is as substantial as that drawn by the supreme court of the United States in the case of municipalities acting under legislative enactments in the presence of constitutional provisions on the one hand, and on the other that of similar corporations acting under the provisions of legislative enactments, in the absence of such restrictions. With Justice BREWER, I am at loss to understand the real grounds for this distinction. It has been formally established, however, by the supreme court, and is a part of the law of the land, and I can see nothing in reason or authority which forbids the application of a similar doctrine to the cases of municipal corporations of a territory acting under and by virtue of the authority of the territorial legislature. In the case of the state, the highest local authority is the constitution; in the case of the territory, the highest organized local authority is that of the legislature. If a bond issued by the municipal authorities of a state, in violation of the highest organic law of the state, is void, I can not understand why it is that a bond issued by a municipal corporation of a territory, in violation of the highest expressed authority of the territory, is not also void.

But, in the view that I have taken of the law, we are not left to the somewhat uncertain rules of construction. The power of municipal corporations of a territory to issue bonds has been the subject of congressional legislation. By acts approved March 2, 1867, June 10, 1872 (Rev. Stat., sec. 1889), it was provided, "the legislative assemblies of the several terri-

tories shall not grant private charters or special privileges, but they may, by general incorporation act, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or in the construction and operation of railroads," etc. A question having arisen as to whether this act of congress did not take away entirely the power of the legislature to grant charters, congress passed an act, the substance of which, or so much thereof as is applicable to the matter under consideration, is as follows: "That the words 'the legislative assemblies of the several territories shall not grant private charters or special privileges,' in section 1889, Rev. St., shall not be construed as prohibiting the legislative assemblies of the several territories of the United States from creating towns or other municipal corporations * * * and conferring on them * * * powers and privileges necessary to their local administration. * * * But nothing herein shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs." Act June 8, 1878 (20 St. 101).

The only remaining question to be determined is whether a county is a municipal corporation, within the meaning of this act. That a county is a corporation will be admitted; that it is not, within the strict sense of that term, a municipal corporation, is conceded. I think, however, that an examination of the authorities will lead us to the conclusion that within the scope of the inhibition contained in the act of congress just referred to, counties may be regarded as municipal corporations. It is very true that Mr. Dillon, in his treatise of the Law of Municipal Corporations, has undertaken to distinguish between "political," "public," and "civil," "municipal," and quasi cor-

porations, wherein he holds that a "school district or county, properly speaking, is not, while the city is, a municipal corporation." Volume 1, p. 22. The references do not sustain the text, while the latter part of the section shows that the learned author was engaged in drawing a distinction in the nature of a preface to the following pages of his work; for he continues by saying: "The phrase 'municipal corporation,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with powers of local administration, as distinguished from other public corporations, such as counties and quasi corporations." If we examine the authorities, we shall find that the distinctions drawn as to different kinds of corporations have grown out of the particular function sought to be invoked, or the particular liability sought to be imposed; e. g., a county, unlike most of municipal corporations, is not responsible for the tort-feasance of its officers and agents, because such officers and agents are, in a large sense, the officers and agents of the state,—of the people, in their political capacity. Nevertheless a county is for many purposes a municipal corporation. The supreme court of Maryland, in the case of *Talbot Co. Com'rs v. Commissioners of Queen Anne's Co.*, gave utterance to the following: "A county is one of the public territorial divisions of the state, erected and organized for public political purposes connected with the administration of the state government, and especially charged with the superintendence and administration of the local affairs of the community, and being in its nature and objects a municipal organization," etc. 50 Md. 246. The supreme court of Iowa treats the subject as follows: "The word 'municipal,' as originally used, in strictness applied to cities only. But the word has now a more extended meaning, and, when applied to corporations the words 'political,' 'municipal,' and 'public' are

used interchangeably. A municipal corporation is defined to be 'a public corporation,' created by government for particular purposes, and having subordinate and local powers of legislation, e. g., a county, city, etc." *Curry v. District Tp. of Sioux City*, 62 Iowa, 102; 17 N. W. Rep. 191, citing *Bouv. Law Dict.*; *Winspear v. District Tp. of Holman*, 37 Iowa, 542; *Land Co. v. Carrol Co.*, 39 Iowa, 151. To show the diversity of understanding as to what constitutes a municipal corporation, I quote from a decision of the supreme court of Wisconsin to this effect: "Towns are often called, in common parlance, and sometimes unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages." *Eaton v. Supervisors*, 44 Wis. 493. The supreme court of Missouri, in defining a corporation for municipal purposes, says: "A corporation for municipal purposes is either a municipality such as a city or town, created especially for local self-government, with delegated legislative powers, or it may be a subdivision of the state for governmental purposes, such as a county, a school, or road districts," etc. *State v. Leffingwell*, 54 Mo. 458. Mr. Bouvier gives the following definition of a "municipal corporation:" "A municipal corporation is a public corporation, created by government for political purposes, and having subordinate and local powers of legislation, e. g., a county, town, city." Citing as authority for this definition 2 Kent, Comm. 275; Ang. & A. Corp. 929. There is another decision, however, that so far as the decision of a state court can be regarded as authority, settles this question beyond controversy. I refer to the case of *Dowlan v. County of Sibley*, decided by the supreme court of Minnesota, and reported at page 430, 36 Minn., and page 517, 31 N. W. Rep. This was an appeal to the district court from the determination of county commissioners in proceedings for the establishment of a

public ditch. From the judgment of the district court it was appealed to the supreme court of the state. DICKINSON, J., in rendering the opinion of the court, after quoting the provision of the state constitution as follows, "that the legislature may by general law or special act authorize municipal corporations to levy assessments for local improvements," etc., said: "The question now presented is whether the words 'municipal corporations,' as here employed, should be deemed to include counties. At the time of the adoption of this amendment, counties might, with propriety, be termed political corporations. The statute declared them to be such. Gen. St. 1866, chap. 8, sec. 75. They were not, however, in the proper and more general use of the term, municipal corporations; yet, for the purposes of general designation, it is not uncommon to use that term in a sense including such quasi corporations as counties and towns, and so sometimes to distinguish public or political corporations or functions from those which would be termed private. Thus, in our own decisions, may be found such language as this: 'A municipal corporation,—a city, county, or town' (Harrington v. Town of Plainview, 27 Minn. 224-229, 6 N. W. Rep. 777); 'a county or other municipal corporation' (County of Blue Earth v. Railroad Co., 28 Minn. 503-507, 11 N. W. Rep. 73). See, also, Winspear v. District Tp. of Holman, 37 Iowa, 542; Ex parte Selma & G. R. Co., 45 Ala. 696-732." After referring to the case of State v. Leffingwell, 54 Mo. 458, to which I have already referred, the learned judge continues: "A late amendment to our constitution prohibits the enactment of special or private laws 'granting to any individual, association, or corporation, except municipal, any special or exclusive privilege, immunity, or franchise whatever.' We feel no doubt that here the exception of 'municipal' corporations has a meaning broad enough to include counties and

towns," etc. "Nor, again, is it apparent why the power of the legislature in the particular here involved should be unrestricted as respects incorporated municipalities, and wholly denied as to counties and towns. Our consideration of this question has led us to the conclusion that the words 'municipal corporations' in the proviso under consideration may reasonably be construed as having the broad, rather than the restricted, sense, and as including such quasi corporations as counties and towns." In view of the foregoing, I think a proper definition of "counties" may be given as follows: A "county," when it represents a subdivision of the state in the exercise of those functions of government common to all the people of the state, e. g., in the organization of courts and the administration of the law, may be regarded as a public corporation of a quasi political character. But when it deals with matters which relate alone to the internal policy of the community of a strictly municipal character, such as the issuance of commercial obligations upon which it may be sued as if it were a private individual, it is a municipal corporation.

If my construction of the act of June 8, 1878, is correct, it is conclusive of this controversy. This act was passed just twenty months before a combination composed of the officers of the Southern Pacific Railroad Company and the county officials of Santa Fe county attempted to fasten a debt of about \$500,000 (for the principal and interest amounts to that sum) on a people two thirds of whom were unable to understand the language in which the pretended contract was written. The act of congress was passed to prevent the perpetration of such wrongs. It was no doubt intended to operate, and did operate, as a disapproval, and therefore as an abrogation, of the act of the legislature of this territory which authorized the issuance of bonds of this character. It is not the province of

the courts to deal with the policy of congress, otherwise much might be said in commendation of this wise legislation. We have seen territories referred to as being in "a state of pupillage." This term is peculiarly applicable to this territory. In a very striking sense it is the pupil and ward of the nation. Pastoral in their habits, conservative in their aspirations, a very large portion of its population live in their mountain homes, and follow their flocks as did their fathers before them. It is the business of the courts to protect them, and to see that their homes and their property are not confiscated to satisfy the greed of corporations.

[No. 448. August 13, 1891.]

**THE UNITED STATES OF AMERICA, APPELLEES,
v. URBANA DURAN DE AMADOR, APPELLANT.**

CRIMINAL LAW—COURTS OF GENERAL JURISDICTION, JUDGMENTS OF—TRIAL—PRESUMPTION—EXCEPTIONS—APPEAL.—On appeal from the final judgment of a court of general jurisdiction, all the details of the trial are presumed to be legal and sufficient, until the contrary is shown. *Territory v. Webb*, 2 N. M. 147; *Territory v. Yarberry*, Id. 458. This court has also repeatedly held that error claimed upon the trial, to which no exception was taken at the time, will not be reviewed on appeal. *Territory v. O'Donnell*, 4 N. M. (Gil.) 196; *Territory v. Baker*, Id. 238.

ID.—IMPANELING OF JURY—VALIDITY OF ACT OF FEBRUARY 26, 1889—EXCEPTIONS.—The act of February 26, 1889 (Session Laws, 1889, p. 227) providing for the impaneling of grand and petit juries to investigate and try causes on the part of the United States, is not special legislation. It is the same as contemplated by the organic act, and the same as has been in operation since the organization of the territory. Nor is the act special legislation so far as the district is concerned, since it provides the same kind and class of juries for every district in the territory.

ID.—PERJURY—INSTRUCTION.—On a trial for perjury a request for an instruction that, "If the jury believe that the witness, Margerito Barela, testified truly, but that the marriage to which she testified was not a legal marriage, they will find the defendant not guilty of perjury in swearing that she was not married" presented a question of law to be submitted to the jury, and was properly refused.

ID.—NEW TRIAL—DISCRETIONARY POWER OF COURT.—A motion for a new trial is a matter in the discretion of the trial court, whose action is not assignable as error on appeal, unless the court has committed reversible error, to which exceptions were taken at the time. *Coleman v. Bell*, 4 N. M. (Gil.) 27.

ID.—INSTRUCTIONS.—Where the instructions given present the issues fairly to the jury, and either party is dissatisfied with them on any point presented, he should offer a proper instruction covering that point. *Territory v. O'Donnell*, 4 N. M. (Gil.) 196.

ID.—PERJURY—ADMISSIBILITY OF ADMISSIONS OF DEFENDANT—EVIDENCE. On a trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage are admissible. But such evidence is to be received with caution, and should always be submitted to the jury under proper instructions from the court.

ID.—MARRIAGE CEREMONY, ADMISSIBILITY OF ORAL TESTIMONY TO PROVE —PRESUMPTION—EVIDENCE.—A marriage ceremony may be proved by any competent witness present at the ceremony; and, when proven, the contract, the capacity of the parties, and the validity of the marriage will be presumed. *Wilkie v. Collins*, 48 Miss. 496.

APPEAL from a judgment of the Third Judicial District Court, convicting defendant of perjury. Judgment affirmed.

The facts are stated in the opinion of the court.

A. B. FALL for appellant.

EUGENE A. FISKE, United States district attorney, for appellees.

LEE, J.—This was an action by indictment, returned in September, 1890, by the grand jury of the Third judicial district, charging the defendant (appellant) with perjury in having sworn falsely in the case of the United States against Urbana Duran de Amador in said court on a charge of adultery. The case came on for trial on the twenty-third day of September, 1890, and the defendant was convicted, and the case is brought to this court by appeal. The counsel for appellant in his brief says that in the record there is manifest error, as shown by the transcript;

that the indictment is insufficient, and is an absolute nullity, in that it was not found and presented by a duly constituted, legal, constitutional, and properly selected and organized grand jury; that the petit jury trying the case was not composed of twelve good and lawful men, as contemplated by the laws of the United States and of this territory; that the court erred in refusing instructions asked by the defendant, and in overruling her motion for a new trial. The record,

COURTS of general jurisdiction:
trial: judgment:
presumption:
exceptions. however, fails to show that there was any exception taken or presented upon either of the assignments made here; nor does

the record anywhere show why or by what means the grand jury that found the indictment, and the petit jury that tried the case, were not lawful and properly constituted juries. The recitals in the record show them to have been good men, taken from the body of the district, fully qualified and properly impaneled; and the record does not show any challenge, or objections to the individual members of either of the juries, and this court has decided that in a court of general jurisdiction all the details of a trial are presumed to be legal and sufficient to sustain the judgment, until the contrary is shown. *Territory v. Webb*, 2 N. M. 147; *Territory v. Yarberry*, Id. 458, and it has also been held that error claimed upon the trial, to which no exception was taken in the court below, can not be reviewed in this court. *Territory v. O'Donnell*, 4 N. M. (Gil.) 196; *Territory v. Baker*, 4 N. M. (Gil.) 238.

The contention in the brief is that the act of February 26, 1889 (Session Laws, 1889, p. 227) is special legislation, and, as such, falls within the provision of the act of congress of July 30, 1886 (24 U. S. St. 178).

IMPANELING of jury: act
February 26, 1889. That act provides for the selecting of two different juries—one to serve on the part of the United States for the district, who are paid by the United States, and one to serve on the part of the terri-

tory for the county, who are to be paid by the territory. So far as the consideration of this case is concerned, it is immaterial what construction may be given to the act, so far as it may be attempted to confer jurisdiction upon the grand and petit juries, thus established to investigate and try cases on the part of the United States, to also investigate and try cases on the part of the territory; for should it be special legislation in that respect, it is not special so far as cases on the part of the United States are concerned, for in that respect it is the same as contemplated by the organic act, and the same as has been in operation since the organization of the territorial government. The power and jurisdiction of the court to impanel a jury was not derived from this act, but it is a proper subject for the legislature to regulate the drawing of juries; and, when legally done, the court will give effect to the act. If the legislature had failed to make provisions for impaneling the juries, the court could have impaneled common law juries, and proceeded with the business of the term, and why the grand jury that returned the indictment, and the petit jury that tried the case, were not good and lawful men, drawn from the body of the district, possessing all the requirements and qualifications of jurors, does not appear in the record; and this court, without such showing, must presume such was the case. In answer to the argument that the act as to the district was special legislation, it is sufficient answer to say that, when the indictment in question was returned, the law provided the same kind and class of juries for every district court in the territory. And if the provisions of the act authorizing the trial of offenses under the laws of the territory by the juries thus created for the trial of offenses against the general government should be held to be special legislation, and void as to such cases, the provisions for the trial of causes on the part of the United States will stand, under the familiar rules of construction, as perfectly as if such provisions were

embodied in a separate act. Cooley, Const. Lim. 211; Coates v. Campbell, 35 N. W. Rep. (Minn.) 366; Endl. Interp. St., sec. 338, and cases there cited.

Even if there was irregularity in the manner of impaneling the juries, the objection would be untenable, being raised for the first time in this court. There is no reason why the fact of a jury having been improperly impaneled for trial should differ from any other irregularity in selecting a jury. Such, for example, where the law requires specifically that jurors shall be citizens of the United States. In such cases, where jurors have not been citizens of the United States, but aliens, this court has repeatedly held that the alienage of the jurors could not be taken advantage of by objections made after verdict. *Territory v. Abeita*, 1 N. M. 545; *Territory v. Yarberry*, 2 N. M. 451; *Anderson v. Territory*, 4 N. M. 108; *Territory v. Baker*, 4 N. M. 122.

It is assigned as one of the errors that the court erred in refusing instructions asked by the defendant.

PERJURY: instructions. The record shows there was but one instruction asked and refused, and that instruction was as follows: "If the jury believe that the witness Margerito Barela testified truly, but that the marriage to which she testified was not a legal marriage, they will find the defendant not guilty of perjury in swearing that she was not married." The jury answers to questions of fact, and the court as to questions of law. The instruction asked the court to submit to the jury was a question of law, and was, therefore, properly refused by the court.

It is urged that the court erred in overruling defendant's motion for new trial. This is a matter in the discretion of the court and can not be assigned as error, unless the court has committed reversible error, to which exceptions have

New trial: discretion of court.

been properly taken, and the motion thereby brought up by exception. *Coleman v. Bell*, 4 N. M. 46.

It is urged that the court did not instruct the jury as to all the law in the case; or, in other words, that it is the duty of the court, whether asked or not, to cover all possible theories of the case. This question has been before the court before, and construed by the supreme court of the territory as follows: "It is insisted that the court should have given instructions covering the theory of the defense adopted by the defendant. The instructions given present the case fairly to the jury; and if defendant was not satisfied with them, and desired any particular point presented to the jury prominently, he should have offered a proper instruction covering the point." *Territory v. O'Donnell*, 4 N. M. 66; *Thomp. Char. Jury*, 781, and cases cited; *Express Co. v. Kountze Bros.*, 8 Wall. 342. The instructions given fairly presented the case to the jury; and, if more specific instructions were desired on any particular point, they should have been asked, and, not having done so, the defendant has nothing to complain of in that particular.

The record shows some objections in regard to the admission of evidence. There was objection to the evidence of the defendant's admissions of her marriage to Canuto Amador. Such testimony is proper evidence. *Miles v. U. S.*, 103 U. S. 312. Admissions in this as in all other cases may be proven, though they do not constitute the strongest class of evidence, and should always be submitted to the jury with a proper warning by the court.

The defendant moved to take from the jury the testimony of Margerito Barela as to a marriage ceremony performed in the republic of Mexico, as being no evidence of marriage. We think the court properly overruled the motion. Any person present at a marriage may testify

INSTRUCTIONS.

PERJURY: admissions: evidence.

MARRIAGE: oral testimony: presumption.

thereto. No case can be found which holds that oral proof is not admissible on the question of marriage. *Patterson v. Gaines*, 6 How. 550; *Nixon v. Brown*, 4 Blackf. (Ind.) 157; *State v. Williams*, 20 Iowa, 98. And, the celebration of the marriage being proven, the contract, the capacity of the parties, and, in fact, the validity of the marriage, are presumed. *Wilkie v. Collins*, 48 Miss. 496. This covers all the objections occurring in the record, and, finding no error, the judgment below will be affirmed.

O'BRIEN, C. J., and FREEMAN and SEEDS, JJ.,
concur.

[No. 449. August 13, 1891.]

THE UNITED STATES OF AMERICA, APPELLEES,
v. DE LUJAN, APPELLANT.

AFFIRMED for reasons stated in *United States v. Urbana Duran de Amador*, 6 N. M., page 173, ante.

APPEAL, from a judgment for appellees, from the
Third Judicial District Court.

A. B. FALL for appellant.

EUGENE A. FISKE, United States district attorney,
for appellees.

LEE, J.—This cause comes here on appeal from the Third judicial district. All the errors assigned in this case have been fully considered and passed upon in the case of *U. S. v. Urbana Duran de Amador*, 6 N. M. 173, decided at the present term of this court. It is therefore unnecessary to consider the assignments in this case in detail. For the reasons

set forth in the case referred to, the judgment of the court below in this case will be affirmed.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ.,
concur.

[No. 450. August 13, 1891.]

THE UNITED STATES OF AMERICA, APPELLEES,
v. CHAVES, APPELLANT.

AFFIRMED for reasons stated in United States v. Urbana Duran de Amador, 6 N. M., page 173, ante.

APPEAL, from a judgment for appellees, from the Third Judicial District Court.

A. B. FALL for appellant.

EUGENE A. FISKE, United States district attorney,
for appellees.

LEE, J.—This cause comes here on appeal from the Third judicial district. All the errors assigned in this case have been fully considered in the case of U. S. v. De Amador, 6 N. M. 173, decided at the present term of this court. It is, therefore, unnecessary to consider the assignments of error in this case in detail. For the reasons set forth in the case referred to, the judgment of the court below in this case will be affirmed.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ.,
concur.

[No. 386. August 19, 1891.]

JESSE M. ELLIS, APPELLEE, v. JOHN B. NEWBROUGH AND A. M. HOWLAND, APPELLANTS.

DAMAGES—DECEIT—SUFFICIENCY OF DECLARATION—ESTOPPEL.—In an action of trespass on the case for damages for deceit, where the declaration alleged that, at the time of the grievances complained of, defendants were engaged in organizing a community of "Faithists;" that by deceit and fraudulent representations that its property would be held in common and the community conducted on principles of brotherly love and morality, plaintiff was induced to join with defendants, and consecrate his life, labor, and all his effects and prospects, together with those of his two children; that defendants knew at the time of making such false representations that the property would not be held in common by the community, but that the title thereto was then and would in future vest in one of the defendants, and that the community would not be conducted on principles of kindness and equality; that one of the defendants was guilty of acts of tyranny and immorality; and that plaintiff remained a member of said community from October, 1884, to April, 1886, working for the community, and defendants refused to pay him for his labor, whereby plaintiff suffered great damage in his loss of time, labor, mental anguish, humiliation, etc., and the proof was that plaintiff was a man of ordinary intelligence, and himself joined lustily in the exercises and services of song of the aforesaid community, when the ode to "Shalam" was sung in the temple of "Tae" to the "tune of Dixie,"—Held: The declaration does not state a proper cause of action; and, if it did, the allegations and proof would present a clear case of estoppel in "Tae." The court can not give its assent to the view of the counsel for appellee that the ode to "Shalam" sung to the "tune of Dixie" was of itself such an act of disloyalty as to entitle the plaintiff to a verdict.

APPEAL, from a judgment for plaintiff, from the Third Judicial District Court, Dona Ana County. Judgment reversed.

The facts are stated in the opinion of the court.

S. B. NEWCOMB for appellants.

W. C. BOWMAN for appellee.

FREEMAN, J.—This is a most extraordinary proceeding. So far as we have been able to extend our researches, it is without a precedent. It comes to us by appeal from a judgment of the district court for Dona Ana county, refusing to set aside a verdict of a jury in favor of the appellee. It is an action of trespass on the case. The declaration sets out substantially the following cause of action, viz.: That, at the time of the committing of the grievances that the plaintiff complains of, the defendants were engaged “in organizing and establishing a community” called “Faithists,” and, being so engaged, the defendants, heretofore, to wit, about the years 1882, 1883, and 1884, wrongfully and corruptly contriving and intending to deceive and injure the plaintiff, issued and published certain false, fraudulent, and deceitful writings, falsely and fraudulently and deceitfully pretending in said writings to describe the true nature and objects of said community, and to set forth the true state of facts in connection with said enterprise, and thereby to induce the plaintiff to believe that said objects and purposes of the defendants, and said facts in connection with said enterprise, were far different from what they really were, and from what said defendants really intended they should be. The declaration then proceeds to set out what it is alleged the defendants held out the enterprise to be, viz.: That the property of the community was to be held in common,—no one individual to have any separate title and property; that said community was to be conducted on principles of brotherly love, without master or leader to exercise control over the members; that all the members were to enjoy equally a permanent place in the community, with no authority on the part of any member or members to exclude another; that said community was laid on principles of sound morality and purity of life; that the plaintiff, misled by these pretenses, was induced to become

a member of the community; "that he did then and there enter into said community with defendants; * * * did consecrate his life, his labor, and all his worldly effects and prospects, together with those of his two children, placing all good faith and confidence in said community; whereas, in truth and in fact, said defendants knew at the time of making said false statements and pretenses that the property of the said community home would not be held in common by the members of said community, but that the title thereto was then and would in future be vested by deed in one individual, to wit, the defendant Andrew M. Howland; and, whereas, in truth and in fact, defendants well knew, at the time of making said false statements and misrepresentations, that said community would not be conducted on principles of equality and kindness, without a master." The declaration then proceeds to charge defendant Newbrough with acts of tyranny, and also with living a life of immorality, etc.; that, by reason of the false representations aforesaid, the plaintiff was induced to become a member of the community; and that he remained a member of such community from October, 1884, until April, 1886, both he and his two children working for the improvement of the home; "and the plaintiff saith that the defendants refused and still refuse, to pay plaintiff for his said work and labor, or any part thereof; by reason whereof plaintiff saith that he has sustained great damage in loss of time and labor and opportunity, and in the education of his children, and that he has suffered great anguish of mind in consequence of the dishonor and humiliation brought upon himself and his children by reason of his connection with said defendants in said community; to the damage of the plaintiff in the sum of \$10,000."

To this unique and weird complaint a demurrer was interposed. The second and fourth grounds of demurrer are as follows: "(2) Because there are no

sufficient facts alleged in plaintiff's said declaration to charge these defendants, or either of them, with any liability to plaintiff by reason of the matters by plaintiff in his said declaration complained of; * * *

"(4) Because the said declaration is duplicitous, in this: that plaintiff in his said declaration has attempted to plead more than one, and various and distinct and different causes of action in one and the same count."

We think the court erred in overruling this demurrer. The most that can be gathered from the SUFFICIENCY of declaration. declaration is that the defendants had conceived some Utopian scheme for the amelioration of all the ills, both temporal and spiritual, to which human flesh and soul are heir; had located their new Arcadia near the shores of the Rio Grande, in the county of Dona Ana, in the valley of the Mesilla; had christened this new-found Vale of Tempe the "Land of Shalam;" had sent forth their siren notes, which, sweeter and more seductive than the music that led the intrepid Odysseus to the Isle of Calypso, reached the ears of the plaintiff at his far-off home in Georgia, and induced him to "consecrate his life and labors, and all his worldly effects," etc., to this new gospel of Oahspe. This much is gathered from the pleadings. The evidence adduced in support of the plaintiff's demand is as startling as the declaration is unique. What the declaration leaves as uncertain, the proof makes incomprehensible. If the court below had been invested with spiritual jurisdiction, it might have been enabled, through an inspired interpreter, to submit to a mortal jury the precise character of plaintiff's demand. We think an examination of the record before us will amply support these conclusions. The first and principal witness offered by plaintiff was himself. He sets out in full the nature of his grievance. He admits, on page 59 of the record, that he made no sacrifice of property to become a member of the organ-

ization, but that he "threw up a situation" in which he could make a good living. What induced him to make this sacrifice is set out in his testimony. First in order came some specimen of literature published by the society, community, order, church, or "Faithists," as they were pleased to call themselves. Over the objections of the defendants, two books were allowed to go to the jury. The first and larger volume is entitled as follows: "Oahspe: A New Bible in the words of Jehovih and his Angel Embassadors. A sacred history of the dominions of the higher and lower heavens on the earth for the past twenty-four thousand years, together with a synopsis of the cosmogony of the universe; the creation of planets; the creation of man; the unseen worlds; the labor and glory of gods and goddesses in the ethereal heavens. With the new commandments of Jehovih to man of the present day. With revelations from the second resurrection, formed in words in the thirty-third year of the Kosmon era." In the preface to the book it is said of it that "it blows nobody's horn; it makes no leader." It is further stated: "When a book gives us information of things we know not of, it should also give us a method of proving that information true. This book covers that ground." The inspired author of this new revelation was doubtless somewhat familiar with the writings of his early predecessors. He had read of the jealousies that had arisen between Paul and Barnabas, so that he takes occasion in his preface to assure his disciples that these gospels are not intended to establish the fame of anyone,—"it blows nobody's horn." And again having seen innumerable sects spring up as a result of a misconstruction, or rather of a diversified construction, of the earlier gospels, we are furnished with the consoling assurance that this book presents the "method of proving that information to be true." With this comfortable and comforting assurance, the

witness opens this volume of light, and bids us satisfy the hungry longing of our restless spirits by feasting our eyes on its simple truths. This new gospel, in order to prepare our minds for the acceptance and enjoyment of its simple truths, proceeds to dispel the mists of superstition that for nearly two thousand years have obscured our spiritual vision. It gives a plain and unvarnished story of the origin of the Christian's Bible. It is this: That once upon a time the world was ruled by a triune composed of Brahma and Buddha and one Looeamong; that the devil, entering into the presence of Looeamong, tempted him by showing the great power of Buddha and Brahma, and induced him (Looeamong) to take upon himself the name Kriste, so that it came to pass that the followers of Kriste were called Kristeyans; that Looeamong or Kriste, through his commanding general, Gabriel, captured the opposing gods, together with their entire command of 7,600,000 angels and cast them into hell, where there were already more than 10,000,000 who were in chaos and madness. This Kriste afterward assembled a number of his men to adopt a Code. At this meeting it is said there were produced "two thousand, two hundred and thirty-one books and legendary tales of gods and saviors and great men," etc. This council was in session four years and seven months, "and at the end of that time there had been selected and combined much that was good and great, and worded so as to be well remembered of mortals." Plaintiff's Exhibit A, page 733, verse 55. The council, or "convention," as it would now be termed, having adopted a platform,—that is, agreed upon a Bible—then proceeded to ballot for a god. "As yet no god had been selected by the council, and so they balloted in order to determine that matter." Plaintiff's Exhibit A, page 733, verse 36. On that first ballot the record informs us there were thirty-seven candidates, naming them.

This list includes the names of such well known personages as Vulcan, Jupiter, Minerva. Kriste stood twenty-second on this ballot. "Besides these, there were twenty-two other gods and goddesses who received a small number of votes each." Plaintiff's Exhibit A, page 733, verse 37. The names of these candidates are not given, and, therefore, there is nothing in the record to support the contention of the counsel that the list includes the names of Bob Ingersoll and Phoebe Coussins. The record tells us that at the end of seven days' balloting "the number of gods was reduced to twenty-seven." And so the convention or council remained in session "for one year and five months, the balloting lasted, and at the end of that time the ballot rested nearly equal on five gods, namely, Jove, Kriste, Mars, Crite, and Siva;" and thus the balloting stood for seven weeks. At this point Hataus, who was the chief spokesman for Kriste, proposed to leave the matter of a selection to the angels. The convention, worn out with speech making and balloting, readily accepted this plan. Kriste, who, under his former name of Looeamong, still retained command of the angels (for he had prudently declined to surrender one position until he had been elected to the other), together with his hosts, gave a sign in fire of a cross smeared with blood; whereupon he was declared elected, and on motion his selection was made unanimous. Plaintiff's Exhibit A, page 733. We think this part of the exhibit ought to have been excluded from the jury, because it is an attack in a collateral way on the title of this man Looeamong, who is not a party to this proceeding, showing that he had not only packed the convention (council) with his friends, but had surrounded the place of meeting with his hosts, "a thousand angels deep on every side," thus violating that principle of our laws which forbids the use of troops at the polls.

After thus endeavoring to demonstrate that Christianity had its origin in fraud, and thus to prepare the minds of its disciples for the new gospel, the Oahspe proceeds to unfold the beauties and the simplicity of the new faith. Passing over many interesting features contained in this exhibit, such as the birth of Confucius, the rise and fall of Mohammedanism, the discovery of America by Columbus, etc., the record brings us to the discovery and settlement of the Land of Shalam, which forms the subject of this controversy. As already seen, the record shows that a tract of land in the county of Dona Ana was selected. This was bought and paid for by the appellant Howland, and conveyed in trust for the use of the society. Among other conditions attached to the trust, one was to the effect that "no meat, nor fish, nor butter, nor eggs, nor cheese, nor any animal food, save honey, shall ever be used upon any part of the premises, except that milk may be given to children under five years old." Transcript of Record, page 167. It is admitted that this, among many other conditions of the trust, was violated; so that on the thirteenth day of March, 1886, the trustees, among whom was the appellee, made a reconveyance of the property to the said Howland. There are many other interesting features presented by this record. Much proof was taken as to the conduct of the society or community which was incorporated under the name and style of the "First Church of the Tae." Record, page 180. They organized also a general cooperative system; established what they called the "Faithist Country Store" (Record, page 87)—an institution, as we are advised, that did well as long as it kept on hand a good stock of faith. There was an outer and an inner council, and contributions were received, to be devoted to the care and education of orphan children. It was charged in the declaration that the members did not

practice that degree of morality which was set forth in their circular, and proof was introduced with a view to show the questionable relations existing between one of the promoters of the scheme and one Miss Vandewater, alias Miss Sweet; but as the plaintiff remained on the premises eighteen months, and as he assigned no such reason for leaving (page 88), and as he made no demand at the time for compensation for work and labor done, nor for his injured sense of morality, we think this is an afterthought. This society of Faithists, while communistic in theory, agrarian in habits, and vegetarian in diet, was not altogether void of sentimentality nor indifferent to the Muses. One of the fair members of the society, inspired by the poetic surroundings of this fair Land of Shalam, composed some beautiful lines that are incorporated into the record on page 62. They are as follows:

"For all things are held in common,
Hooray! Hooray!
Thus everything belongs to all,
And peace abounds in Shalam;
Away, away, away out west in Shalam!"

The authoress of these beautiful and touching lines is Nellie Jones, a member of the society. She is not made a party to this action, however, and, therefore, no judgment can be rendered against her. The lines were, by direction of one of appellants, Dr. Newbrough, sung to the air of "Dixie." We can not give our assent, however, to the views of the able counsel for the appellee that causing these lines to be sung to the air or "tune of Dixie" was of itself such an act of disloyalty as to entitle the plaintiff to a verdict. The writer of this opinion, like the appellee, is himself a native of the land of Dixie, that

"Fair land of flowers,
And flowery land of the fair."

—And, as he reads these lines of Nellie Jones, memory carries him back to the days of his boyhood, and

to the land of the "magnolia and the mocking bird."

O, glorious Land of Shalam! O, beautiful Church of Tae! When the appellants, the appellee, Ada Sweet, and Nellie Jones, aforesaid, formed their inner circle, and like the morning stars sang together, it matters not whether they kept step to the martial strains of Dixie, or declined their voices to the softer melody of Little Annie Rooney, the appellee became forever estopped from setting up a claim for work and labor done; nor can he be heard to say that "he has suffered great anguish of mind in consequence of the dishonor and humiliation brought on himself and children by reason of his connection with said defendants' community." His joining in the exercises aforesaid constitutes a clear case of estoppel in Tae.

There is another reason, however, why this act of disloyalty on the part of the appellants should not prejudice them; and that is that the plaintiff himself joined in the chorus when the "tune of Dixie" was sung. On page 109 of the record appears the following, the plaintiff himself being upon the witness stand: "Question. You all sang this with a good deal of lustiness? Answer. No, sir; we sang it to the tune of Dixie. Q. All joined in the chorus? A. Yes, sir; all that could." Pretermittting any expression of opinion as to whether it would, under any circumstances, be competent to allege and prove in this court that the ode to Shalam had been sung to the tune of Dixie, it is in proof, as we have seen, that the parties were in *pari delicto*, and, therefore, neither can avail himself of the other's wrong.

It is insisted, however, that the appellee was deceived by the appellants; that they did not carry out the purposes set forth in their circular and manifestoes; and that they did not live up to the doctrines contained in their Bible. The plaintiff admits that he had read their books thoroughly before he joined them. He belonged to the inner circle; was one

ESTOPPEL.

DECEIT.

of the trustees; joined in the worship; sang in the choir; and listened to the soul-enrapturing voice of Nellie Jones. Moreover, he had entered into the Holy Covenant. That covenant is found in chapter 5 of the Book of Jehovih's Kingdom on Earth. Plaintiff's Exhibit A, page 833. The twenty-fourth verse of the covenant is as follows: "I covenant unto Thee, Jehovih, that, since all things are thine, I will not own nor possess, exclusively unto myself, anything under the sun, which may be intrusted to me, which any other person or persons may covet or desire, or stand in need of." Under the terms of this covenant, he can not maintain his suit, for the defendants insist, and the proof is clear, that they "covet or desire or stand in need of" the \$10,000 for which the plaintiff sues. This is a complete answer to so much of plaintiff's cause of action as is laid in assumpsit, just as his participation in the church exercises, music, etc., was an estoppel to his right to set up "anguish of mind" and ruined reputation and other matters founded in tort.

It is insisted, however, that the appellee has a right to recover for a deceit practiced upon him; that he was misled by the Oahspe and other writings of the society. On the contrary, the defendants maintain that the appellee is a man who can read, and who has ordinary intelligence, and this the appellee admits. This admission precludes any inquiry as to whether appellee's connection with the Faithists, their inner and outer circles, their music and other mystic ceremonies, their general warehouse and cooperative store, and other communistic theories and practices, gave evidence of such imbecility as would entitle him to maintain the suit. Admitting, therefore, that the appellee was a man of ordinary intelligence, we find nothing in the exhibits which in our opinion was calculated to mislead him. True, the Oahspe, like other inspired writings, such as the Koran, Bunyan's Pilgrim's Progress, and other

works of like character, deals largely in figures and tropes and allegories. But, read in the light of modern sciences, they are beautiful in their very simplicity. We would be glad to embody the whole of plaintiff's Exhibit A, but must confine ourself to such citations as will, in our opinion, be sufficient to sustain this view. A careful examination of appellee's Exhibit A, the New Bible of Oahspe, leads us to the inevitable conclusion that its splendid exhibitions of word painting were not confined to the Mesilla valley, although it is in proof, and, indeed, is not denied, that a much larger volume might be written, and yet not exhaust the subject of that valley's many attractions. But, while there are many descriptive features in the record that unquestionably apply to the section in controversy, there are others that bear on their face a very different application. As a specimen of the former, we cite the following, found on page 370 of the Exhibit A: "Next south lay the kingdom of Himalawowoaganapapa, rich in legends of the people who lived here before the flood; a kingdom of seventy cities and six great canals, coursing east and west, and north and south, from the Ghiee mountain in the east, to the West mountain, the Yublahahcolaesavaganawakka, the place of the king of bears, the EEughehabakax (grizzly). And to the south, to the middle kingdom, on the deserts of Geobiathhaganeganewohwoh, where the rivers empty not into the sea, but sink into the sand, the Sonogallakaxkax, creating prickly Thuazhoogallakhoomma, shaped like a pear." As an illustration of that portion of the exhibit which, in our opinion, was not designed as a description of the Land of Shalam, we cite the following, found on the same page of the exhibit. "In the high north lay the kingdom of Olegalla, the land of giants, the place of yellow rocks and high spouting waters. Olegalla it was who gave away his kingdom, the great city of Powafuchswowitchahavagganeabba,

with the four and twenty tributary cities spread along the valley of Anemoosagoochakakfuella. Gave his kingdom to his queen, Minneganewashaka, with the yellow hair, long hanging down." This unquestionably refers to Chicago. The author, after giving a general description of many lands and cities, leads his "deciples" to some high point, most probably Sierra Blanca (from whose snow-covered summit the summer breezes fall like a gentle cascade over the valley of the Pecos), and spreads out before them a vast system of irrigation. The following is taken from the record, and will be found commencing on page 369 of appellee's Exhibit A: "Beside the canals mentioned, there were seven other great canals, named after the kings who built them, and they extended across the plains in many directions, but chiefly east and west." Speaking of the vast canals that formed a network of the beautiful valley, the record says: "Betwixt the great kings and their great capitals were a thousand canals, crossing the country in every way, from east to west and from north to south, so that the seas of the north were connected with the seas of the south. In kanoos the people traveled, and carried the productions of the land in every way."

We are of the opinion that a proper cause of action was not set out in the declaration, and that there was no evidence to sustain the verdict of the jury awarding the plaintiff \$1,500; that the refusal of the trial judge to set aside the verdict was error; and, therefore, the judgment of the district court should be reversed.

O'BRIEN, C. J., and LEE and SEEDS, JJ., concur in the result.

McFIE, J., being of counsel in the case below, took no part in the consideration of this case.

[No. 413. August 19, 1891.]

MITCHELL A. MINOR ET AL., APPELLANTS, v. J. H.
MARSHALL, APPELLEE.

MECHANICS' LIEN—SUFFICIENCY OF NOTICE—SEC. 1524, COMP. LAWS, 1884—CONSTRUCTION OF STATUTES.—Statutes providing for mechanics' liens are in derogation of the common law, and, as such, must be strictly construed. By a strict construction is not meant an arbitrary or inequitable construction, or such as would give the owner, or third parties, an opportunity to take advantage of legal technicalities to deprive the laborer of his just wages, but such a construction as will require a substantial compliance with the statute; and this requirement of the statute (Comp. Laws, 1884, sec. 1524) is met by a notice which alleges that the debtor "was the owner or reputed owner" of the property. *Finane & Elston v. Las Vegas H. and Imp. Co.*, 3 N. M. (Gil.) 415; *Hobbs v. Spiegelberg*, Id. 362, distinguished.

ID.—VERIFICATION OF NOTICE—SUFFICIENCY OF.—A verification to a notice of lien which states that the "abstract of indebtedness mentioned and described in the foregoing notice is true and correct" is not a sufficient compliance with the statute, which, after prescribing the several statements which shall be embodied in the claim, requires that the "claim must be verified." Sec. 1524, Comp. Laws, 1884.

APPEAL, from a judgment in favor of defendant, from the Third Judicial District Court, Sierra County. Judgment affirmed; **FREEMAN, J.**, dissenting.

The facts are stated in the opinion of the court.

J. MORRIS YOUNG and **EDWARD L. BARTLETT** for appellants.

ELLIOTT & PICKETT for appellees.

SEEDS, J.—This is a suit in equity brought to foreclose a number of liens filed against the "Humming Bird" mine, in the county of Sierra, as allowable under section 1532 of the Compiled Laws of 1884 of this territory. To the bill there was interposed a demurrer, which was sustained by the lower court and the bill dismissed. The plaintiffs assigned various grounds of

error growing out of the sustaining the demurrer. It might be stated here that it would be a better practice for the trial judge, in passing upon a demurrer which is predicated upon various grounds, to specifically state and have it made a matter of record upon which grounds, if less than all, he bases his judgment; for it may be that his judgment was based solely upon one ground, while the record necessarily brings up all the grounds formally alleged in the pleading, and requires a decision upon points which may not be decisive of the case—being harmless error, and really in accordance with the judge's holding; yet the announcement here, though in fact the same as in the court below, would seem to be against him.

The material points to be considered, under the assignment of errors, are: First, were the notices of the claims for the liens, filed by the plaintiffs, insufficient because they alleged that the defendant "was the owner, or reputed owner," of the mine against which the liens were sought to be established; and, second, were the notices of the claims invalid because said claims were not properly verified?

The appellants contend, in the first place, that, as the bill sets out the action properly, the demurrer admits the facts thus pleaded to be true, and, therefore, it was error to sustain the demurrer. But this contention must be based upon the supposition that the facts pleaded were well pleaded, and were not conclusions of law. Now, one of the material facts in the case is, were the legal notices of claim given in accordance with the statute? If they were not, the case must fail. If, too, that fact was so pleaded, as that the notices appear in the bill, and their illegality is seen upon the face of the pleading, then certainly that fact can be reached by demurrer. The notices of claims were all made parts of the bill as exhibits, and as parts of the allegations of the facts

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sufficiency of
notice.

required. This being true, the demurrer was the proper pleading by which to raise the question of their sufficiency.

As a predicate for the discussion of the errors raised by this record, it is insisted by the appellants, and denied by the appellee, that the mechanics' lien law should be liberally construed. Each party contends vigorously that his exposition of that issue is supported by the adjudications of this court. It must be conceded that in some way two cases, delivered at the same term of this court, have in their opinions statements which are diametrically opposed to each other. In the case of *Hobbs v. Spiegelberg*, 3 N. M. 362, Judge AXTELL says: "We fail to see how this statute is in derogation of the common law;" and, "Nor do we think that the doctrine of liens is either new, in derogation of the common law, or inequitable." A careful consideration of this case will convince one that these remarks were wholly unnecessary to a determination of the case, and hence could not be enunciating a principle to bind the court unless reversed. The fact is that the doctrine of "in derogation of the common law" is invoked simply to uphold a strict construction in a given case when the facts call for a construction; but Judge AXTELL in this very case, when making the statements above quoted, continuing said: "Nor is it possible for us to see any necessity for construction." This case is, then, no authority upon the question as to how the mechanics' lien law should be construed. In the case of *Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. M. 415, however, the court undertook specifically to place a construction upon a portion of the statute in regard to the verification of the claim, and in passing upon the principle to govern in the construction of the whole statute Judge BELL says: "The rights conferred by these statutes are purely statutory, and were utterly unknown to the common law or in chancery. They are in violent derogation of the rights of property at

the common law, and must be strictly construed." This enunciation of the principle governing in such cases does not conflict with the holding in the case of *Hobbs v. Spiegelberg*, but only with language not necessary to the case, and hence must be accepted by us, unless we are ready to overrule it. The statement that mechanics' lien laws are in derogation of the common law can hardly be successfully controverted; for they place liens upon property which before and under the common law had been sacredly protected against any but those of a mortgage or a judgment. More, they render it possible to incumber an estate, even against the knowledge, and, in any case, against the wish, of the owner. *Phil. Mech. Liens*, sec. 9.

But by "strict construction" it is not meant an arbitrary, inequitable, or harsh construction—one which will give the property owner, or even third parties, the opportunity to take advantage of technicalities to deprive an honest laborer of his wages—but such a construction as will require a substantial compliance with the statute; such a one as, while it protects the honest laborer, can not be made the means by a loose and uncertain construction of perpetrating fraud, or of holding out inducements thereto. *Hooper v. Flood*, 54 Cal. 218. A strict construction is fully met which simply requires the laborer to bring himself by his notice clearly within the provisions of the statute; and when this is done the construction is the one adopted by the supreme court of the United States. *Davis v. Alvord*, 94 U. S. 545. The terms "strict" and "liberal" are comparative simply, and in most of the cases are used without definition. They are only used in the light of the facts of each specific case. Such an interpretation as will demand a substantial compliance with all the requirements of the law will be sufficient. With this character of a construction we are satisfied that the rights of all parties will be protected.

1. Were, then, the notices of claim of liens insufficient, because they alleged that the defendant "was the owner or reputed owner" of the mine in question? The argument is that the law requires a distinct statement of who the owner or reputed owner is, and that the proof must meet that single specific allegation; that in this case the allegation is in the disjunctive, the allegation being one or the other, and therefore it is erroneous. Does this statement in any way mislead the persons for whom the notices are intended? The object of the statute is to give the laborer a lien for his wages upon the property, as against the owner or reputed owner. It makes no difference which the party is; in either case the laborer is entitled to the lien providing he states, with other things, who the owner or reputed owner is, if he knows. He may be uncertain whether the party is the owner or reputed owner. If, then, in his notice, he says to the world that a certain person is the owner or reputed owner, no one is damaged; and if, upon foreclosure proceedings, he proves either allegation, he certainly substantiates his claim upon that point. In the case of *Arata v. Tilluiriun G. & S. Mfg. Co.*, 65 Cal. 340, the court held the allegation of "owner and reputed owner" a substantial compliance with the law, for the party could have been both. So, in this case, he can be either, and, if so, the requirement of the statute has been met. If, then, the learned judge passed upon this point adversely to the plaintiffs in the court below, as it must be presumed he did, from the form of the record, it was error. But, in any view of the case as here presented, it was a harmless error.

2. Were the notices of claim of liens properly verified? The verification was substantially the same as to each claim. The claims themselves
VERIFICATION of notice. set out fully what the statute requires, and in all but one case were signed by the party asking the

lien. To the notices were attached affidavits, also signed by the parties, and sworn to before a notary. Those affidavits necessarily refer to the claims to which they are attached. Do they substantially verify the claim? The following is one of the affidavits: "On this * * * personally appeared * * * before me, and who, being by me first duly sworn, on his oath states that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing and unpaid to him from the said * * * mine and its owner the sum," etc. Section 1524, Compiled Laws, 1884, states what the claim should be, and what should be verified. A part of the section is as follows: "A claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and condition of his contract, and also a description of the property to be charged, which claim must be verified by the oath of himself, or of some other person." It is very evident that the claim contains certain specific statements,—five in number,—any one of which being absent annihilates the claim of lien. Phil. Mech. Liens, sec. 342. It is also plain that the claim—not any one or more averments of the claim less than all, but the claim itself—must be verified; and, if such claim is not verified, it is no notice, and binds no one; it raises no lien whatever. *Finane v. Las Vegas Hotel & Imp. Co.*, 3 N. M. 415. This verification need not be in the exact language of the statute; for, if it substantially meets the requirements of the statute, it is all that is necessary. But substantial compliance is not met when the verification does not cover all the essential elements of the claim; or when, under the guise of substantial compliance, the

court must add something to the affidavit or oath by intendment in order that the statute may be complied with. It is not necessary in this territory that there should be an affidavit to the claim. It is sufficient if the claim is signed by the party, and that the notary or other proper officer, under his signature and seal, says that it is sworn to by the person signing it. But the want of a verification, or of a sufficient verification, is a defect which goes to the whole claim, and can not be amended. Phil. Mech. Liens, sec. 366. It is fatal, though the party actually swear to the claim, if the notary has neglected to sign the verification or attach his seal. *Finane v. Las Vegas Hotel & Imp. Co.*, supra. While it was not necessary for the claimant to make an affidavit, he has done so, and in it he has specifically stated what he has sworn to, and by that he is bound. He swears "that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct." Can this, in substance, mean the whole claim above set out? It is contended that the words "abstract of indebtedness" are intended to mean the whole claim, and that we should so interpret it. But in the claims themselves there is a specific statement of a moneyed indebtedness, placed in a brief form, as the law requires. To that brief statement of indebtedness the affidavit naturally relates. Are we justified, in order to sustain the lien, to suppose that it means more than it says? We do not hold that the verification should be the language of the statute, or that it should necessarily use the term "claim." Any set of words unmistakably pointing to the whole claim will be sufficient. If the affidavit had said the "above abstract," as it might fully cover the claim without great violence to the language, it might have been sufficient. The claimant was not satisfied with that, but limited its application by the use of the qualifying words, "of indebtedness." The word "abstract,"

standing alone, would have a general or indefinite meaning, but in this case it is immediately limited when the words "of indebtedness" are added to the single thought of owing money. The statute says he must give a statement "of his demands after deducting all just credit and offset." That is a statement of the indebtedness; but there are four other essentials of the claim, all of which must be verified, or the lien is not perfected. In this case the indebtedness is all that is verified. The only apparent answer to this line of argument is to contend that there is no indebtedness unless all the five essentials of the notice are present; that indebtedness is only a fact when it grows out of the presence of the five requirements of the statute constituting a good notice. But this is palpably fallacious, for this reason; the indebtedness is a personal claim independent of the lien. Can it be said that this defendant could not have been indebted to these plaintiffs unless he had been the owner or reputed owner of the mine? Certainly not. He might have been a contractor, as in the Las Vegas Hotel case, in which he would have been indebted to the plaintiffs for working for him in the mine, yet it would not have been necessary to have alleged that he was the owner or reputed owner to sustain the indebtedness. The plaintiffs could have sworn that "the above abstract of indebtedness was just and true," and have had no reference to the ownership or to the terms of the contract, and yet his verification be absolutely truthful. Will it be contended that there could not have been an indebtedness in this case if the claimant had neglected to have described the property or have given the terms of the contract? Certainly not. Yet would not the affidavit have referred in that case specifically to the "abstract of indebtedness," etc.? If it would, how can it be said in this case to cover more than in the case supposed? It should be remembered that the rule of con-

struction, whether strict or liberal, has reference to the language of the statute, not to that used in compliance with the statute. The question here is, not what construction shall be given to the words "abstract of indebtedness," but to the word "verification," as used in the statute. We said that the word "verification" in the statute does not require an affidavit; it does not require the signature of the party to the affidavit; it does not require the word "claim" to be used; but it does require that the officer who certifies to the oath should sign the same, and attach his seal thereto; it does require the use of such plain and unmistakable language that there can be no reasonable doubt but that he is swearing to the whole claim. There can be no injustice to any one in thus holding, while any other holding would be fruitful of unnecessary litigation. If any use of language might meet the requirements of a verification, then there is no possible rule by which to determine what that language should be, except the opinion of the judge in any given case. And no one would ever be certain that the verification was proper unless the case was taken to the court of last resort. Language should be used in every case which, without labored argument or intendment, will cover the whole requirement of a verification; and such language as will the more readily and naturally apply to a part only of the requirements of the verification ought not to be made by intendment to cover more than in sound logic it is able to do. The verifications to these claims being imperfect, the judgment of the lower court was correct, and will accordingly be affirmed.

O'BRIEN, C. J., and LEE, J., concur. McFIE, J., did not sit in this case.

FREEMAN, J. (dissenting).—I find myself unable to agree with the majority of the court in the conclu-

sions reached in this case. This is an appeal from a decree rendered by the district court of Sierra county, dismissing appellants' bill filed in said court to enforce a lien for work and labor performed on a certain mine of which respondent was the owner or reputed owner. The only question presented for our determination is as to the validity of the verification of the notice of the lien. The verifications in all the cases are substantially identical, so that we give one as illustrating all. It is as follows:

"TERRITORY OF NEW MEXICO, } ss.
"County of Sierra.

"On this the twenty-seventh day of February, 1888, personally appeared before me the above named Mitchell A. Minor, and who, being by me duly sworn, on his oath states that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing and unpaid to him from said Humming Bird mine and its owner the sum of \$259.

"MITCHELL A. MINOR.

"Subscribed and sworn to before me this twenty-seventh day of February, 1888.

[NOTARIAL SEAL.]

"GEORGE A. BEEBE,

"Notary Public."

It is insisted that this verification does not meet the requirement of the statute, which after prescribing the several statements which shall be embodied in the claim, provides that the "claim must be verified," etc. Much has been written on the subject of the proper construction to be given to statutes providing for mechanics' lien. By some authorities it has been held that the statute gives preference to one creditor over another, and ought therefore to be strictly construed. By others the doctrine announced is that these statutes are remedial in their character; that they are enacted to protect a class of persons not always able to protect themselves,—parties whose labor and toil have con-

tributed materially to the value of the property sought to be charged with the lien; and that, therefore, such statutes should receive a liberal construction. Phil. Mech. Liens, sec. 16. Our own supreme court has held both of these conflicting doctrines. *Hobbs. et al. v. Spiegelberg*, 3 N. M. 362, and *Finane et al. v. Las Vegas Hotel & Imp. Co.*, 3 N. M. 415. I believe the correct doctrine to be that when the controversy arises between the mechanic and the owner of mining property, or one in privity with the owner, a liberal construction should be given to the remedy; that, on the contrary, where the enforcement of the remedy must result in charging the owner of the property with a debt not contracted by him, and with a debt already paid to the contractor, then the remedy should have a strict construction. Phil. Mech. Liens, sec. 18. This case falls within the first condition named. The owner of the property, the value of which was enhanced by the labor of the appellants, resists the enforcement of their lien upon the highly technical ground that the verification alleges that the "abstract of indebtedness mentioned and described in the foregoing notice" is true, whereas the statute requires that the "claim must be verified."

It is admitted that the claims set out in the notices are substantially in accord with the statute. The notices themselves, if we except that of *McCrillis*, found on page 44 of the record, seem to be, not only a substantial, but a literal, compliance with the statute; and I think the notice of *McCrillis*, while it does not comply literally with the statute, is sufficiently specific to entitle the complainant, as against the owner of the mine, to the remedy provided by statute. The notice sets out—First, the name of the mine; second, its location; third, the name of the foreman; fourth, the time at which the work was done; fifth, the number of days, and the price per day, etc.; sixth, the

name of the owner and manager; seventh, the total amount due from the owner of the mine, "upon which nothing has been paid."

The sole purpose of the notice is to advise the owner of the mining property that the mechanic or workman looks to the property as a security for his debt, and that unless his claim is satisfied he will resort to the remedy provided by statute. The statute requires several matters to be set out in the claim, including, among others, a statement of the demand; the name of the owner or reputed owner; the name of the person by whom the claimant was employed; with a statement of the terms, time given, and conditions of his contract; also a description of the property to be charged with the lien; "which claim must be verified by the oath of himself or some other person." It is insisted that the statement in the verification under consideration, that "the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and there is still due and owing and unpaid," etc., is not a satisfaction of the requirements of the statute; that the words "abstract of indebtedness" are not the equivalent of the word "claim;" that, instead of stating that the "abstract of indebtedness mentioned and described in the foregoing notice" was true, the affiant should have stated that the "foregoing claim" is true, etc.; that the affidavit in this case may be literally true; that is to say, the abstract of indebtedness set out may be correct, and yet, by reason of some defects, the claimant may not be entitled to maintain his lien. I can not assent to this view. The debt, if it existed, grew out of the special matters set out in the notice. It required all of those to constitute a valid claim, and an affidavit that "the foregoing abstract of indebtedness is true" is the equivalent of the statement that the "foregoing claim" is true. "Claim" itself is equivalent to "abstract of indebted-

ness." It required every item contained in the notice to make up this abstract. What the claimant means by the abstract is the several matters set out in the notice, for he follows up this language with a statement as to the amount of money due him. It is insisted, however, that this is a matter of construction; that, if the affiant were on trial for perjury committed in any false statement as to matters set up in his claim, he could not be convicted, inasmuch as he has not sworn that the claim is true, but only that the "abstract of indebtedness" is true. I can not accept this construction. If any material matter set out in the notice was false, then the statement that the "foregoing abstract of indebtedness is true" was also false; or the validity of it depended upon the truth of the matters set out in the notice. Why is not the expression "the foregoing abstract of indebtedness" as comprehensive as the expression "the foregoing claim?" The statute prescribed no form for the verification. It merely provides that the "claim must be verified." How it is to be verified is left largely to the sound judgment of the claimant. The fact that this law was intended to provide a remedy for laborers and mechanics, a class of men not understood to be skilled in the use of legal forms, and that the legislature failed to provide a form for their use, is to my mind satisfactory evidence that it was not intended that the law receive a strict or technical construction. It requires no liberal use of language to suggest quite a number of forms that might be used as a verification of claims of this character. Take either of the following for example: "The foregoing claim is true;" "The statements made in the foregoing notice are true;" "Affiant is entitled to the lien by virtue of the matters set out in the foregoing notice;" and yet I doubt whether either of the examples given satisfies more fully the requirements of the statute than the language used in the case under

consideration. Mr Jones, in his work on Liens, in section 1452, says: "As to the form of verification, if the statute does not prescribe it, or the general purport of the affidavit, the better practice is to annex a declaration under oath to the effect that the facts stated are true." It has been held, however, in cases similar to this, where the purpose was to verify a claim, that no formal affidavit was necessary. The statement of the claim, followed by the informal certificate "sworn to," was held sufficient. Jones on Liens, 1452. See, also, Mr. Phillips' Work on Mechanics' Liens (section 366), wherein, treating of verification of claims, he says that the "signature of the claimant appended to his statement, and the certificate of the clerk of the court that he made oath to the accompanying affidavit, is a substantial compliance with the statute which demands that the statement shall be verified by oath;" citing *Taswell v. Presbyterian Church*, 46 Mo. 279. In the case of *Kezartee v. Marks et al.*, 16 Pac. Rep. 407, decided by the supreme court of Oregon, the verification was as follows: The claimant set out the facts necessary to constitute the notice and signed the paper. Appended to this was the following:

"Subscribed and sworn to before me _____
25, 1886.

"T. R. SHERIDAN, County Clerk."

In ruling upon the validity of this verification, the court said: "Counsel for appellant also object to these 'claims' for the reason they are not verified. Section 3673, Hill's Code, requires a claim 'to be filed with the county clerk,' 'which claim shall be verified by the oath of himself, or some other person having knowledge of the facts.' This statute does not prescribe any particular form in which such verification shall be made. No doubt the better practice would be in the form of an affidavit, to be annexed to the claim, to the effect that the facts therein stated are true; but, the

statute not having prescribed the form, we do not feel disposed to say that a claim signed by the party, and verified by his oath, is invalid. The present lien law was evidently designed to simplify the proceedings thereunder to a greater extent than any preceding statute in this state on that subject, and this form of verification may be all that the legislature designed. We therefore hold that these claims were verified."

The supreme court of Indiana, discussing the subject of mechanics' liens, in the case of *Gilman et al. v. Gard*, 29 Ind. 292, say: "This statute is eminently remedial, intended for the benefit and protection of subcontractors, journeymen, mechanics, and laborers, and the courts should not indulge in such niceties of construction, or such useless requirement in practice, as will tend to defeat its object, without resulting in any good end." In Tennessee it was said the lien given to mechanics should not be defeated by a too rigid construction of the statute; so that, although it is given on the condition that a "special contract with the owner of the lot of ground" is made by the mechanic or undertaker, nothing more is required than an employment and undertaking to do the work. 2 Swan (Tenn.), 313. In the case of *DeWitt v. Smith*, 63 Mo. 266, the notice of the lien described the house as situate on block 2. It appeared on trial, however, that the building was on lot 20. The lien was maintained on the ground that defendant owned no other property in any other part of the city, and was not, therefore, misled by this description. The statute requires that the notice shall contain "a true description of the property, or so near as to identify the same." The statute (Wag. Stat., p. 909, sec. 5) requires that there be given under oath a true description of the property. The affidavit in this case was that "the above is a true description of the building." Here the affidavit is defective, in that it does not refer to the

“property,” but the “house,” and it is further defective, in that it gives to the house a wrong location. In sustaining this lien the court say: “There is great reluctance to set aside a mechanic’s claim merely for loose description, as the acts generally contemplate that the claimants prepare their own papers;” and again: “The courts at one time were inclined to hold that enactments for mechanics’ liens were in derogation of the common law, and their provisions ought, therefore, to be construed strictly against those who sought to avail themselves of their benefits; but the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction, to advance the just and beneficent objects had in view in their passings. Their great aim and purpose is to do substantial justice between the parties, and those should never be lost sight of in giving them a practical construction. * * * Had a third party purchased the property with no other notice of record, he might have been deceived by the misdescription of the block, and so it would not be notice to him. * * * As to Schell, the owner in this case, it could not be pretended that he was misled.”

Applying this doctrine to the case under consideration, I ask, how is it possible to suppose that the owner of the mine was misled by this verification? Suppose the verification was defective, who is injured by it? Is it possible to suppose that the owner of the mine did not know that these laboring men were endeavoring to avail themselves of the means offered by the statute to secure a just recompense for their toil? Is he to be allowed to enjoy the fruits of their labor because, forsooth, they used two unnecessary words in their verification? In the opinion of the majority of the court, it is admitted that no particular form is necessary. “Any set of words unmistakably pointing to the whole claim will be sufficient,” it is said. It is

admitted that the claimant need not even have used the word "claim" in his verification; that the terms "above abstract" might have been sufficient; but it is insisted that the claimant has himself destroyed the force of his verification by the limitation placed upon it by the use of the words "of indebtedness." If he had said, "the foregoing abstract is true," his verification would have been good; but having said, "The foregoing abstract of indebtedness is true," his verification is absolutely void, and he must lose every dollar of the wages due him for labor in the mine. This construction seems to me, not only substantially, but literally, inaccurate. Let us turn again for a moment to the verification itself, and see if it bears evidence of an intention on the part of the claimant to limit his verification to the amount due. He swears to two substantive facts: First, that "the abstract of indebtedness mentioned and described in the foregoing notice is true and correct;" second, that "there is still due and owing and unpaid to him * * * the sum of," etc. It seems to me too clear for argument that the first clause of this verification is intended to embrace, and does embrace, every material allegation set out in the notice, and that the second clause is intended as a verification, and is a verification of the fact that the indebtedness still exists. The construction given by the majority eliminates entirely from the verification the first clause thereof, for, if it was the intention of the affiant to limit the verification to the "indebtedness," the second paragraph of the verification was all that was necessary. Nor am I able to concur with the majority of the court that the construction which they have given to this statute will have the effect of preventing litigation. On the contrary, it will result in promoting litigation, unless the legislature shall amend the law. Here is a statute which, without suggesting any form, declares that the claim must be

verified, and yet in construing that statute it is held that the verification is fatally defective, because it is limited by the two words "of indebtedness."

The statute prescribes no form, nor does the opinion of the majority prescribe any form. The only suggestion as to form is contained in the following language, taken from the opinion of the majority: "Language should be used in every case which, without labored argument or intendment, will cover the whole requirement of a verification." This is precisely what I insist was done in the case at bar. It seems to me that, so far from any argument being necessary to show that these miners intended to verify these claims, it requires the most refined criticism to show that they did not intend to verify their "claims," but meant only to verify the "indebtedness." The decision reached in this case exposes miners and mechanics to the very dangers from which it is assumed they ought to be protected, viz., the peril of having their liens declared void unless verified in such form and manner as will, in the opinion of the court, meet fully all the requirements of the statute. It must not be forgotten that as a rule mechanics and miners are not lawyers, and that this statute was passed, not for the benefit of lawyers, but of mechanics. I submit, therefore, that the opinion in this case, so far from aiding the mechanic, will be found to complicate his difficulties. The liens in the cases at bar are declared void, and the miners made to lose their wages, because they improperly used the two words "of indebtedness." The next attempt may be futile because it does not contain enough. How is the miner to know that he has brought himself within the rule by the "use of such plain and unmistakable language that there can be no reasonable doubt but that he is swearing to the whole claim?" I think the better rule may be stated as follows, to wit: That where it appears that the miner or mechanic has used words

which by plain intendment were designed to operate as a verification, and where it is evident that the miner or mechanic was endeavoring to secure the benefit of the statute provided for such cases, and where such statement is sworn to, it ought to be regarded as a verification, within the meaning of the statute.

For these reasons I am unable to concur in the opinion rendered by a majority of the court; but there is another consideration which, though not raised in the argument, is, in my opinion, entitled to great, if not controlling, weight. The law creating a lien in cases of this character is found in the Compiled Laws, sections 1519 to 1541, inclusive. Section 1519 defines a lien. Then follows section 1520, which declares, in substance, that every person who performs labor on any mining claim, whether such labor be performed at the instance of the owner or other person having charge of any mining, "has a lien upon the same." Section 1523 provides that this character of lien shall be preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the work commenced, and preferred also to prior unrecorded liens. Then follows the section already discussed, which relates to the verification and recording of such liens. Now, it is to be observed that section 1520 creates and fixes this lien in the most unequivocal terms, without reference to any verification on record. The language of the statute is not that anyone performing the work and filing and verifying the claim shall have a lien; it does not provide even that anyone performing the work may have a lien. The language of the statute is: "Every person * * * who performs labor in any mining claim has a lien upon the same for the work and labor done or materials furnished." Independently, therefore, of the provisions of the statute making these preferred liens from the commencement of the work, independently of

what has been said in defense of a liberal construction of the law, I am satisfied that, as between the mechanic and the owner of the property, no registration of the lien is necessary. As between the parties themselves, what is the necessity for recording the lien? I know of no instance in which, as between the parties themselves, it is necessary to the validity of an instrument that it be recorded. What is the purpose, and the only purpose, of recording an instrument? It is, of course, to give notice to strangers. But this is not all; for it is to be observed that, in cases of this character, it is not the contract of the parties, but the statute, that creates the lien. The contract of the parties, which may be oral or written or implied, creates the obligation, but the statute fixes the lien. The whole of section 1524 is devoted to the purpose of prescribing the mode by which such liens may be good as against third parties, and has no reference, as between the parties themselves, to the creation of the lien. The context also shows that the law contemplates unrecorded as well as recorded liens, i. e., shows that it is not necessary to the existence of the lien that it be recorded. To illustrate: Section 1540 provides that "whenever any lien, recorded, has been paid or discharged," etc. So, also, section 1541 provides that "all liens shall take effect as to the different persons who have liens from the time of filing the same for record." If to perfect the lien, as against the owner of the property, it is necessary to record it, why use the words I have emphasized? Why not have said, "All liens shall take effect from the time of filing the same?" Under the familiar rule, that *expressio unius est exclusio alterius*, the omission to mention the owner as a party against whom the lien is to take effect only upon registration is itself a legislative construction of the act. I am therefore clearly of the opinion that, in order to entitle themselves to main-

tain this action, it was not necessary for the appellants to give any public notice or to verify or record the claims. Section 1520 creates the lien, and section 1524 prescribes the mode by which such lien may become notice to the world, and bind the property, as against a subsequent incumbrance.

[No. 440. August 19, 1891.]

L. CERF & COMPANY, APPELLEES, v. G. BADARACO, APPELLANT.

CONTRACT OF SALE—RESCISSION—INSTRUCTIONS—EVIDENCE.—In an action of assumpsit for goods sold and delivered, on an order by mail, where it was a disputed question of fact whether the goods were of the kind ordered, and the jury found that they were, the defendant could not complain of an instruction that, "if a person orders goods, and he receives the goods he has ordered, if he does not wish to accept them it is his duty to return them immediately to the party from whom he ordered them; and if he retains them without any order direct from the sender to that effect, he would become liable for them, and, if they were burned up while in his possession, he would be responsible for them," etc. If an order for goods is sent by mail, and the order is strictly complied with by the party on whom it is made, the contract is complete in law, and the party ordering has no right to return the goods without payment; and, if they are destroyed by fire while in his possession, he is equally bound.

ID.—VERIFIED ACCOUNT, SUFFICIENCY OF—EVIDENCE—VERDICT.—Where, in such case, the plaintiffs introduced a verified account of the claim set out in the declaration, this was sufficient to establish prima facie every material averment thereof (sec. 1878, Comp. Laws, 1884); and a verdict of the jury, upon the question whether the evidence offered by defendant was sufficient to overcome the prima facie case thus established, will not be disturbed, in the absence of any substantial errors of law.

APPEAL, from a judgment in favor of plaintiffs, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

W. B. CHILDERS for appellant.

The rule of law applicable to goods sold on order is not correctly stated by the court. The true rule as appellant contends is that "property in goods of different quality from those ordered does not vest in the purchaser until he accepts them with a knowledge of their quality, or after he has had a reasonable opportunity of determining their quality, and neglects to notify the seller of his refusal to accept." *Diversey v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154, and note; *Barton v. Kane*, 17 Wis. 729, 84 Am. Dec. 729; *Bruce v. Thompson*, 2 Hill, 137; *Loyd v. Wight*, 65 Am. Dec. 636; *Babcock v. Trice*, 18 Hill, 420, 86 Am. Dec., and note; *Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, and note.

The third instruction of the court is also erroneous. The person who orders goods and leaves the seller to select the goods, is not bound by any selection the seller may make. There is an implied warranty that the goods sent shall be valuable, merchantable, and suitable for the purpose for which they are known to be wanted. 2 Kent, Com. 478, 481; 2 Benj. Sales, sec. 843, 844, and notes, also sec. 918.

The seller is bound to give the buyer an opportunity to inspect the goods, and an acceptance for that purpose is not a waiver of the right to reject the goods. 2 Benj. Sales, sec. 966, p. 844, and note. See, also, *Id.*, secs. 1042, 1051, 1052, and notes.

N. C. COLLIER for appellees.

O'BRIEN, C. J.—This is an action of assumpsit brought by L. Cerf & Co., a copartnership of St. Louis, Missouri, to recover the purchase price of a quantity of cigars and cigarettes sent by the firm to the defendant, Badaraco, Albuquerque, in the month of December, 1887. The defense was non assumpsit. The cause was tried to a jury, before LEE, J., presiding, at the fall term, 1889, resulting in a verdict in favor of plain-

tiffs for \$245, the full amount claimed. Defendant moved for a new trial, on the ground of erroneous instructions given, and of refusing to give certain instructions requested, and because the verdict is against the law and the evidence, which motion the court refused to grant. The cause is here on the appeal of the defendant from the judgment entered on the verdict. The errors assigned for determination are: (1) "Because the court erroneously instructed the jury: 'Now, if a person orders goods, and he receives the goods he has ordered, if he does not wish to accept them, it is his duty to return them immediately to the party from whom he orders them; and, if he retains them without any order direct from the sender to that effect, he would become liable for them, and, if they were burned up while in his possession, he would be responsible for them.' 'If the defendant ordered a certain specific kind of goods, he would not be obliged to receive the goods if they were not in accordance with those that he had ordered, and he might refuse to accept them; but, if he did so, he would have to return them. If a party orders goods, and directs the persons from whom he orders to select goods of a certain kind, and permits him to make the selection, and the goods are sent accordingly, then he would be responsible for them, because he trusted the other party to select the kind of goods that they were to send. In that case, he would be responsible whether the goods suited him or not; but if he directed a certain kind of goods to be sent, and the goods sent were not according to the order, and he immediately notified the parties that they were not the goods that he had ordered, and that he would not accept them, and they directed him to hold them, then he would not be responsible.' " (2) "Because the court erred in overruling defendant's motion for a new trial." (3) "Because the verdict is against the law and the evidence."

Properly to appreciate the nature and scope of the alleged errors, we will state that plaintiff, in support of its demand, introduced a verified account of the claim set out in the declaration, and
VERIFIED ac-
counts, sufficien-
cy of: evidence. rested. This was sufficient, under section 1878, Compiled Laws, 1884, to establish, prima facie, every material averment thereof, and entitled plaintiff to a verdict for the amount claimed. The defendant, being the chief witness in his own behalf, to overcome the case so made by plaintiff, in his examination in chief and cross-examination testified: "Question. Are you the defendant in this case? Answer. Yes, sir. Q. State the facts to the jury about the shipment of the cigars mentioned in this affidavit which has been read to the jury. A. He sent me before that there thing eight thousand cigars, and after four months I ordered eight thousand. I told him, 'Send the same kind of cigars.' He never sent any; he sent some other kind. I went to take them cigars from the depot, and take them out to my store, and after I got them there I opened the case, and found they were not the same kind of cigars. I wrote to him back I never accept them cigars, because it is not the kind I wanted; and then he answered me back to keep the cigars for him until he came. Q. Did you receive that letter from him? A. That letter my bookkeeper used to keep, and everything in the place was burned up. Q. You say he wrote to you to keep them until he came? A. Yes, sir; until he came. Q. You mean until one member of the firm came? A. Before when he came my house got a burning, and after he came he wanted to make arrangements with me. If I would give him fifty dollars, he would give me full receipt. Q. What had become of the cigars in the meantime? A. Cigars all burned in the store. Q. Did you sell any of these cigars? A. No, sir; I opened up the case to see, and I put them back in the case and closed up

the case, not one cigar being used. Q. You say you told him to send you the same kind of cigars you had ordered before? A. Yes, sir; he never did, he sent other kind. Q. Were they the same brands? A. No; different brands, altogether. Q. You ordered these in letter, did you? A. Yes. Q. Who wrote the letter? A. Dr. Sutherland, the one who used to keep the book, and everything, and do all of my business. Q. How long after you wrote to him that you did not take the cigars was it before the house was burned? A. I do not know exactly how many days; I think about twenty-five, thirty, or forty days. I can not say, exactly, more or less. Q. How long after the house was burned was it before he came here? A. The house was burned in January, and he came in January, the 27th or 28th of January,—something like that. Q. What was the difference in the quality of the cigars which you ordered and the cigars which were sent? A. The difference was at least one half in value. Q. Were the cigars which they sent you worth what they charged you for them? A. What he charged me? No, sir; that is why I refused them. Cross-examination: Q. Well, you only made objection to the cigars, did you not? A. Yes, sir. Q. The cigarettes were all right? A. The cigarettes were all right. I ordered the cigarettes, and he sent them the same as I ordered, and the cigars he never did; and the time I saw the cigars, they were nothing of my sort of fashion. I left the cigarettes and cigars in the same case, and never took them out. Q. Did you not write him in that letter, 'The cigarettes are all right; the cigars I do not want at any price?' A. I do not know that I wrote him that. I wrote to send cigarettes \$2.00 per thousand, and I take them; if he send me more, I never take them. * * * Q. Were the cigars you ordered all one brand, or of different brands? A. They were several different brands. Q. Were they all to be one price

or different prices? A. They were to be the same price as I had bought them before. They were ranging from \$15.00 to \$20.00. Q. The names of what brands did you put in your letter? A. I can not tell you. Q. Did you name any brands at all? A. I believe that I did not state any brands at all; simply told him to send me a good cigar, and to be of the same brands I had before. Q. You said all that in your letter? A. I believe this is what I told them. I can not tell you every one of the letters. Q. You left it to their judgment to select the cigars, if they did not have the same kind of cigars as you ordered? A. Yes, sir; I left it to their judgment." Dr. Sutherland and Pablo Blase testified also in behalf of defendant, but their testimony is of so indefinite and unsatisfactory a character that we do not deem it entitled to sufficient weight to warrant us in setting out any part of it in this opinion. When defendant rested, plaintiffs offered in evidence deposition of one Oscar Fleisheim, clerk of L. Cerf & Co. Defendant objected to the offer. Plaintiffs contended that portions of it would be clearly proper in chief, but that other portions were admissible in rebuttal, especially in reference to the alleged contents of defendant's letter containing order for the goods. Defendant thereupon, by leave of court, read answer to third interrogatory: "State what you may know about the sale of cigars and cigarettes by plaintiffs to defendant on or about December 6, 1887." Answer, read to court: "On the 6th day of December, we, L. Cerf & Co., received a letter from G. Badaraco, the defendant, dated at Albuquerque, December 1, 1887, in which he requested us to send him 3,000 cigars, at \$20.00 per thousand; 3,000 cigars, at \$25.00 per thousand; 3,000 cigars, at \$30.00 per thousand; and 10,000 Old Rip cigarettes, at \$2.00 per thousand. This order was executed in accordance with Badaraco's letter, and all of the articles above enumerated were

shipped to him by us, in one case, directed to defendant at Albuquerque, N. M., on same day that we received his order." Whether this testimony, and other portions of the deposition, were submitted to the jury or not, it is difficult to determine from the record; and it would be as fruitless as improper to attempt to review, with any degree of intelligence, this and various other offers of proof made by the respective parties during the progress of a trial remarkable as a model of obscurity and confusion. In the present state of the record, we will content ourselves with an examination of the errors assigned by appellant.

Defendant, to overcome the prima facie case made by plaintiff, endeavored to show that the goods sent were not the kind he had ordered, except the cigarettes. This is the substance of the contention between the parties. The exceptions to the three paragraphs of the charge must be examined and their merits determined in view of this issue. Had the goods ordered been delivered, as maintained by plaintiff, the instruction contained in the first paragraph is clearly against the plaintiff, and appellant has no cause to complain. The law is, if a person send an order by mail for goods, and such order is strictly complied with by the party on whom the order is made, that the contract is complete, and the party ordering has no right to return the goods without payment. If there be an inaccurate expression found in the second paragraph, it could not mislead, in the light of the testimony and of other portions of the charge, wherein the law is clearly stated. For instance, the statement that, if the goods received were not such as defendant had ordered, he might refuse to accept them, but if he did so he would have to return them, though not strictly correct, could not have injured the defendant. The jury must have found from the evidence, and would have found, whether this part of the

CONTRACT of sale:
rescission: in-
structions: evi-
dence.

charge had been given or not, that the goods sent corresponded with the goods ordered, or they could not have found in favor of the plaintiff. The exception taken to the third paragraph is equally devoid of merit. Defendant did not refuse to accept and pay for the cigars because they were not suitable, valuable, or merchantable, but because they were not such as he had ordered. The statement of defendant that the cigars were not half so valuable as those ordered is but the expression of an opinion based on the assumption that they were not the goods ordered. We find no material error in the instructions given.

The other two assignments of error, in view of the disposition made of the first one, are not well taken. We can not say, from the record before us, that there is not sufficient evidence to support the verdict. Had defendant introduced no proof, when plaintiff rested, the latter would have been entitled, under the provisions of the law cited, to a verdict for the amount of his claim. If the defendant, in his endeavor to overcome the prima facie case thus made, failed to satisfy the jury, by a preponderance of evidence, of the merits of his defense, we are not at liberty, in the absence of any substantial errors of law, to disturb the finding of the jury upon disputed questions of fact. It follows that the motion for a new trial was properly overruled. We may add that, in our opinion, had the cause been more regularly and fully tried in the court below, the evidence in support of the verdict would have been strengthened rather than impaired. The judgment appealed from will be affirmed.

McFIE, SEEDS, and FREEMAN, JJ., concur. LEE, J., having heard the case below, took no part in this decision.

[No. 443. August 19, 1891.]

PATRICK P. FORD, PLAINTIFF IN ERROR, V.
CHARLES MCGARVEY, DEFENDANT
IN ERROR.

ATTACHMENT—CONTINUANCE—PRESUMPTION—ERROR.—On error from an order refusing a continuance, where the affidavits on which the request was based are not in the record, the presumption is there was sufficient reason for refusing it.

ID.—CONTRACT—ASSUMPSIT—MEMORANDUM TO REFRESHEN MEMORY—EVIDENCE.—In a suit in assumpsit by attachment on a contract by a subcontractor against the contractor for an alleged balance due, where the former, in testifying, consulted a memorandum to refreshen his memory, which he testified was a copy of the original paper, and no offer was made to show that the paper was not a copy of the original, and there was no dispute as to the amount due, but simply whether the defendant was liable on an order given by plaintiff to a third party, the memorandum was not a proper subject of cross-examination, and the defendant had no right to cross-examine the witness as to such memorandum.

ID.—CONTRACT—CONDITION PRECEDENT—EVIDENCE—PRESUMPTION—INSTRUCTION.—In such case, where it appeared the parties had agreed that in no case should anything be paid on the subestimates until the contractor was paid on the regular estimates, and had attempted to settle before suit, and the only dispute was as to the liability of the contractor on an order given by the subcontractor to a third party, the contractor admitting that the money was due the subcontractor, and never claiming that he had not been paid on the regular estimates, which had theretofore been regularly paid; and there was evidence that the contractor had not fulfilled his contract with his employer: this evidence raised the presumption, in the absence of any evidence to the contrary, that the defendant had either been paid, or had forfeited his right to payment by his own fault; in either case the court was justified in directing the jury to find for plaintiff.

ERROR, from a judgment in favor of plaintiff, to the Fourth Judicial District Court, Colfax County. Judgment affirmed.

The facts are stated in the opinion of the court.

J. D. O'BRYAN for plaintiff in error.

THOMAS B. CATRON for defendant in error.

SEEDS, J.—This is an action in assumpsit by attachment, wherein the plaintiff seeks to recover, as a subcontractor, from the defendant the sum of about \$4,000. The defendant, Ford, had contracted with the Springer Land Association to do the excavating and banking upon a ditch being built through the Maxwell land grant. He sublet parts of this work, and the plaintiff became one of the subcontractors. He performed his work in a satisfactory manner, and was paid in accordance with his contract, except for the last part of the work finished May 28 or 29, 1889. Not being able to settle amicably for this, he sued Ford. There was a trial to a jury, and evidence was introduced upon both sides. After the defendant had closed his testimony, the judge instructed the jury to find a verdict for the plaintiff, which was done. Thereupon the defendant perfected his appeal to this court. There are four questions material to be considered, arising under the assignment of errors. They are: (1) Did the judge abuse his discretion in refusing the defendant a continuance? (2) Was it error to refuse the defendant the privilege of cross-examining the plaintiff upon a paper with which he refreshed his memory? (3) Did the judge place the wrong construction upon the contract between the plaintiff and the defendant? (4) Was a portion of the instruction of the court to the jury incorrect?

1. As to this point, it is only necessary to say that by some mistake the alleged affidavits upon which the request for the continuance is based are not in the record. The presumption is that the court found that there was sufficient reason for refusing the continuance.

CONTINUANCE:
presumption.

2. The plaintiff was asked the exact amount due him from the defendant, and, being unable to state, refreshed his memory by consulting a memorandum, which he testified was a copy of an original paper. Upon cross-examination, the defendant sought to question him regarding the paper. It was objected to, and the court sustained the objection. There was no offer or intimation to show that the paper was not a copy of the original. The ground of complaint is simply that the defendant had the right to cross-examine as to the paper used. We think that this memorandum plainly comes under the first class as laid down in Mr. Greenleaf's classification, and is not of right a subject of cross-examination. 1 Greenleaf on Evidence, section 437. Then, too, the evidence showed that there was no dispute about the amount actually due under the contract, but simply a disagreement as to whether Ford was liable for a sum due to a third party to whom McGarvey had given an order upon Ford. The memorandum was used specifically to refresh his memory as to the amount due under the contract.

MEMORANDUM
to refresh
memory:
evidence.

3. The contract between the parties, under which the work was done, contained this stipulation: "It is mutually agreed that the amounts of these subestimates will in no case be demanded or paid in the advance of the payments of the regular estimates." Ford was to be paid, upon the general estimates, on or before the tenth of each month. The defendant contends that the part of the contract above quoted is a condition precedent; that under it Ford must first be paid by the land company before McGarvey can demand his pay; and that he (the plaintiff) must allege and prove that Ford has been so paid. Conceding that this is a condition precedent, and yet it does not necessarily follow that the position taken by the defendant is correct, under

CONTRACT:
condition preced-
ent: evidence.

the evidence in this case. Such conditions are made in contracts to protect rights, and to effectuate fair dealing and honesty, not to be made the means of defrauding men of their just dues. The evidence showed that the parties attempted to settle before suit was instituted. Ford admitted that the work was done satisfactorily, and that the money—less \$380—was due. The only difference between them was as to the \$380. He at no time objected to paying McGarvey, because he had not as yet been paid for the estimate due him June 10. On the other hand, he admitted that the money was due McGarvey. Now, legally, under his contention, the money was not due McGarvey until the land company had paid him. Thus it must be assumed from the testimony either that he had been paid in accordance with the contract with the land company, or that he had failed to comply with the terms of that contract by which he was entitled to his pay. If the last alternative be true, then, surely, he can not set up his own wrong to defeat an innocent man out of his rights. It is true that this evidence was given by the plaintiff, but he was nowhere contradicted, and it is presumed to be true. If it was not a fact, Ford well knew it, and should have been present to deny it. There was some evidence drawn from the defendant's own witness going to show that he had failed to perform his part of the contract in accordance with its terms. If that be so, then he can not predicate his refusal to pay this plaintiff upon his own wrong. The courts and the law were not brought into being for the purpose of aiding parties under such circumstances. It would be a sad commentary upon the justice of the law if, in such a contract as this, the obligor could say, as Ford undertakes to do here: "I was not to pay you until I received my pay. I have not performed my contract so as to entitle me to any pay, and, therefore, you must suffer for my wrong."

The days for such vicarious offerings have, we trust, gone by. *Blair v. Corley*, 29 Mo. 480; *Craemer v. Wood*, 102 Mass. 441. "One who prevents the performance of a condition, or makes it impossible by his own act, can not take advantage of his nonperformance." *Navigation Co. v. Wilcox*, 7 Jones (N. C.), 481; *Camp v. Barker*, 21 Vt. 469.

It is further urged, however, that the plaintiff was bound to allege and prove the fulfillment of the condition precedent. The plaintiff made the allegation. Did he prove it? The amount of proof which fairly sustains a proposition depends to a great extent upon the evidence against it. There was no evidence whatever that Ford had not been paid, while there was the evidence that at all times previously he had been promptly paid; that he had not claimed at any time to McGarvey that he had not been paid; that he acknowledged that the money was due the plaintiff. All this, however slight, raised a presumption, in the absence of any opposing evidence, that the defendant had been paid, and fully justified the trial judge in instructing the jury to find a verdict for the plaintiff.

4. The remaining contention is that the court erred in the part of the instruction which it gave the jury, in which it said: "There is a legal presumption that the company paid Mr. Ford the amounts due him at the time stated in the written contract, and there has been no evidence here to show that they have failed in performing that obligation." Appellant insists that this, in substance, told the jury that, though the plaintiff was bound to allege the fact of payment at the time set out in the contract, still it was proven by a legal presumption, unless the defendant negatived it by affirmative evidence. But this criticism is not substantial for these reasons: First. It assumes that the charge was given with no reference to the evidence in the case; that

INSTRUCTION:
presumption.

assumption can not be allowed for a moment. Second. Assuming, as we must, that the charge was given with reference to the evidence before the jury, it has been shown that there was some evidence on the question, and none against it; hence the instruction was correct. The legal presumption referred to by the judge in his charge undoubtedly had reference to the presumption raised by the negative evidence. Finding no error in the record, the judgment of the lower court will have to be affirmed.

FREEMAN, LEE, and McFIE, JJ., concur. O'BRIEN, C. J., did not sit in this case.

[No. 421. August 20, 1891.]

LARKIN F. BELL ET AL., APPELLEES, v. MINOR
M. GAYLORD AND THEODORE W.
HEMAN, APPELLANTS.

ATTACHMENT—SERVICE OF PROCESS—SUFFICIENCY OF.—Process in attachment served upon a resident defendant, in his absence, by delivering a true copy of the original to some person over fifteen years of age, residing at the usual place of abode of such defendant, is sufficient under section 1898, Compiled Laws; service by publication is not necessary in such case. *Spiegelberg v. Sullivan*, 1 N. M. 575.

ID.—NOTICE OF LIS PENDENS—MECHANICS' LIEN—PRIORITY.—Section 1853, Compiled Laws, providing that, in all actions in the district court "affecting title to real estate," the plaintiff may file in the probate court a notice of his suit pending, authorizes the filing of such a notice where real estate is seized under a writ of attachment. By such seizure the plaintiff in attachment acquires a lien on the property attached, from the time when such notice is filed with the probate clerk, which has priority over any claim of lien upon the property for work done after that time, under section 1523, Compiled Laws.

APPEAL, from a judgment in favor of plaintiffs, from the Fourth Judicial District Court, Lincoln County. Judgment reversed.

The facts are stated in the opinion of the court.

WARREN & FERGUSON for appellants.

W. Y. HEWITT for appellees.

McFIE, J.—The record in this case presents a contest for priority between a lien by attachment and a mechanic's lien. From the facts agreed upon and stipulated, it appears that the appellant, Theodore W. Heman, in the district court for Lincoln county, on the twentieth day of February, A. D. 1883, brought suit in assumpsit by attachment against Minor M. Gaylord, and on the twenty-third day of February, 1883, the sheriff of said Lincoln county attached, among other property, the Rockford mining claim, situated in Lincoln county, New Mexico, and which was at the time the property of said Minor M. Gaylord, and served notice of the suit upon Gaylord, as required by law, the same day. On the twenty-eighth day of February, 1883, notice of suit pending was filed by appellant, as provided in section 1853, Compiled Laws, 1884. Appellant recovered a judgment in the attachment suit, May 19, 1884, for \$5,325, and the property involved in this suit was sold, the appellant becoming the purchaser, receiving a deed for the premises, and entering into possession of it. There was no appeal from the judgment in the attachment suit, nor were the appellees in this cause parties to the attachment proceeding. The appellees, Larkin F. Bell, Robert Quaye, Alexander Benford, Samuel McLeod, Benjamin F. Wilson, William Burris, and Abraham S. Warren joined in a suit in chancery to foreclose liens which they claimed for work alleged to have been done upon the mining claim in controversy, being the same property purchased by appellant under attachment proceedings. It is stipulated in the record "that no part of the labor performed by complainants, or any of them, took place

or begun sooner than the beginning of summer in 1883, and that all of the complainants were employed by said Minor M. Gaylord, the owner of said Rockford mine, without the knowledge or consent of the appellant, Theodore W. Heman." Gaylord and appellant were made respondents, and the court below held the service of process and notice of suit pending insufficient, and entered a decree in favor of the appellees, and declaring a lien upon the property. The cause is in this court by the appeal of Theodore W. Heman, the attaching creditor. The record does not disclose all of the proceedings in the court below, either in the attachment proceeding or in the case here, and in determining the case we will consider all of the proceedings in the court below regular that are not disclosed or properly excepted to. The appellant contends that the court below erred in holding the sheriff's return of service of process insufficient, and that the notice of suit pending was insufficient; and indeed it is apparent from an inspection of the record that the court so held, else it could not have entered the decree complained of. If the court below had jurisdiction in the attachment proceeding, the judgment, and the sale and the conveyance under it, were regular and valid, no appeal having been taken by the defendant in that case.

It must be taken as agreed between the parties that, in the court below, the appellant set up his title to the real estate in controversy by virtue of his purchase under the attachment proceeding, and offered necessary proof to sustain it, as the fact of judgment, sale, and purchase by appellant are referred to in the stipulation. The only contention is that relating to service and notice of suit pending; and counsel have so presented the cause in argument in this court. In *Cooper v. Reynolds*, 10 Wall. 308, it was held that, "when a judgment of a court is offered in evidence collaterally in another suit, its validity can not be ques-

tioned for errors which do not affect the jurisdiction of the court that rendered it; and where there is a valid writ and levy, a judgment of the court, an order of sale, and a sale and sheriff's deed, the proceeding can not be held void when introduced collaterally in another suit." No objection is made to the writ of attachment in the court below nor in this court, and the sheriff's return shows that he levied the writ of attachment upon the property in controversy some months prior to the time the appellees began the work for which they claim a lien; therefore, when the levy was made, an inchoate or conditional lien attached in favor of the appellant, subject to consummation by the rendition of a valid judgment. When the judgment was rendered, it related back to and established the lien acquired by the seizure of the property, February 23, 1883, if the court had jurisdiction. Jurisdiction has reference to the power of the court over the parties, the subject-matter, and over the res or property in controversy. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the res in an attachment proceeding relating to real estate is obtained by a seizure of the property by virtue of a valid writ of attachment within the territorial jurisdiction of the court. That the court had jurisdiction of the subject-matter is not questioned, but that the court had jurisdiction of the person in the attachment proceeding is denied.

The first error assigned is: "The court below erred in holding the sheriff's return of service of process insufficient in law." It is competent for each state and

ATTACHMENT:
service of
process upon
resident
defendant.

territory to prescribe the mode of bringing parties before its courts, and the regulations made for that purpose are binding upon its own resident citizens. It is undoubtedly competent for the legislature to prescribe such modes of judicial proceeding as it may deem proper, to direct

the manner of serving process, and the notice which shall be given to defendants. The legislature has prescribed the manner in which process shall be served in this territory, and in attachment cases. Section 1935, Compiled Laws, provides that "the writ or other lawful statement of the cause of action shall be served on the defendant [as an ordinary citation]." As to the manner of serving ordinary process upon resident defendants, section 1898, Compiled Laws, provides: (1) "By reading the original process to the defendant, and delivering a true copy, if required;" (2) "by delivering a true copy of the original process to the defendant;" (3) "if the defendant be absent, by delivering a copy of the original process to some person residing at the usual place of abode of the defendant, over fifteen years of age." The sheriff's return of service is as follows:

"I have served the within writ of attachment by delivering copy of the same, with a copy of the declaration and affidavit, to Minor D. Gaylord, son of the defendant, a person over the age of fifteen years, at the defendant's place of residence in Lincoln county; and I have attached all the right, title, and interest of the defendant in and to the following mining claims in Nogal district, Lincoln county, New Mexico, viz.: 'Rockford,' 'Clipper,' 'North Home,' 'Cashier,' 'Pennsylvania,' 'White Rose,' 'Roschelle,' 'Black Swan,' 'Twin Brothers,' 'Plymouth,' 'Valley Lode,' 'Gaylord Placer,' and I have served the schedule of the property attached by leaving a list thereof with the said Minor D. Gaylord, and notice thereof at the premises.

(Signed) "JOHN W. POE, Sheriff.

"By JAMES R. BRENT, Deputy.

"Lincoln County, February 23, 1883."

The objection to the service as shown by the returns is that the writ was not served upon defendant, but by leaving copy at defendant's usual place of abode, and that notice by publication was not given. That this

service was sufficient is not an open question in this territory. In the case of Spiegelberg et al. v. Sullivan, 1 N. M. 575, it was held that "service of an attachment issued on an affidavit showing that the defendant has absconded and absented himself from his usual place of abode may be made by leaving a true copy thereof at the usual place of abode of the defendant with some free person over the age of fifteen years, and publication is not necessary." The provisions of law as to service in that case were similar to the provisions of sections 1898 and 1935 above set out, except that the word "free" is omitted from section 1898. It is true that the affidavit in that case alleged that the defendant had absconded and was absent from his usual place of abode; but as the affidavit in this case is not before the court, and there is no suggestion that the proper affidavit was not filed, it must be presumed that the proper affidavit was filed as a basis for the service made in a collateral attack upon the attachment proceeding. It follows that the service was sufficient, and that service by publication was not necessary to confer jurisdiction upon the court. The court, having jurisdiction both of the person and subject-matter, properly gave judgment for the appellant, and ordered the sale of the property attached to satisfy the judgment. When the appellant purchased the property at such sale (as it is agreed he did) and obtained a deed for the same, he became the owner of it to the full extent of the interest of the defendant Gaylord, at the time of the seizure and attachment, and it is admitted he was the sole owner of the property at that time.

The second assignment of error is: "That the court erred in holding the notice of suit pending insufficient in law." The record is very meager, and does not point out any specific objection made in the court below, but enough is gathered from the record and briefs of counsel to show that, in the court below, the appellees in

NOTICE of lis
pendens:
mechanics' lien:
priority.

this court insisted that, although "notice of suit pending" was filed with the probate clerk as required by law, still it was notice to them, as the law did not authorize the filing of his *lis pendens* in an attachment proceeding. Section 1853, Compiled Laws, provides that, "in all actions in the district courts of this territory affecting title to real estate in this territory, plaintiff, at the time of filing his petition or complaint, or at any time thereafter before judgment or decree, may file with the clerk of the probate court in each county in which the property may be situate a notice of the pendency of the suit. * * * " The appellees contend that the attachment proceedings did not "affect the title to real estate," within the meaning of the statute. The language of the section above referred to is very plain, and sufficiently comprehensive to embrace "all actions in the district courts" affecting the title to real estate, whether at law or in equity. That notice of suit pending may be properly filed in an attachment proceeding depends upon whether or not specific real estate has been seized on, or is the *res* of the proceeding. In this case real estate was seized under the writ of attachment, and was rendered subject to the order of the court to the extent of sale and conveyance of the property. The title was, within the meaning of section 1523, Compiled Laws, "affected," and *lis pendens* was properly filed by the appellant. The appellees were chargeable with full notice of the attachment suit, and that it was a lien upon the property attached from the time when the notice was filed with the probate clerk of Lincoln county, February 28, 1883. Such being the case, appellees had no legal right to a lien upon the property for work done upon it, unless by virtue of the provisions of the mechanics' lien law. Section 1523, Compiled Laws, is as follows: "1523. The liens provided for in this act are preferred to any lien, mortgage, or other incumbrance which may have

attached subsequent to the time when the building, improvement, or structure was finished, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." It is clear that the appellees are not entitled to a lien under this section, for it is agreed that the attachment suit was commenced and the property seized some months prior to any work being done by appellees for which they claimed the lien; and, second, they had notice of the prior lien before any work was done by them. If it is contended that the *lis pendens* did not charge them with notice because it was unrecorded, a perfect answer to that is that the statute does not require notice of suit pending to be recorded. The "filing" of such notice is sufficient, and complies with the requirements of the law.

The court below permitted the appellees to attack the judgment in attachment collaterally, which could only be done in case of absence of jurisdiction in the court which rendered the judgment. The service and notice alone were questioned, and held insufficient to confer jurisdiction, and the court decreed a lien upon the property in controversy in favor of appellees. We are of opinion that the service of process was sufficient to confer jurisdiction; that the notice of suit pending was valid; and as the appellant had a prior lien which had ripened into ownership, the property was not subject to the lien of the appellees. The court below erred in holding service of process and notice of suit pending insufficient, and in granting the decree complained of. The decree of the court below is reversed.

O'BRIEN, C. J., and LEE, SEEDS, and FREEMAN, JJ., concur.

[No. 432. August 20, 1891.]

**TERRITORY OF NEW MEXICO, DEFENDANT IN
ERROR, V. JENNIE LOWITSKI, PLAINTIFF
IN ERROR.**

CRIMINAL LAW—ASSAULT AND BATTERY—APPEAL FROM JUSTICE COURT TO DISTRICT COURT—TRIAL DE NOVO.—The right of appeal in criminal cases from a justice's court to the district court is given by section 2414, Compiled Laws, 1884; and when such appeal is perfected the cause is then within the jurisdiction of the district court to be disposed of, by trial de novo, as other criminal cases there pending. Sections 2390, 2395, of the Compiled Laws, 1884, and rule 16 of the district court, which provide that in all cases of appeal from a justice's court, when the cause is regularly called on the docket, the plaintiff may, at his election, have the appeal dismissed, or the judgment below affirmed, apply only to civil causes, and the district court has no power to render judgment upon the sentence of a justice's court in a prosecution for assault and battery, but must try the case de novo.

ERROR, from a sentence, upon default, to the First Judicial District Court, Santa Fe County, rendered upon a sentence of the justice of the peace of precinct number 4, said county, convicting the defendant of assault and battery with words. Sentence reversed.

The facts are stated in the opinion of the court.

N. B. LAUGHLIN for plaintiff in error.

EDWARD L. BARTLETT, solicitor general, for territory.

SEEDS, J.—This was a criminal action, originally brought and tried before a justice of the peace in and for the county of Santa Fe, in accordance with the provisions of section 726 of the Compiled Laws of 1884 of this territory. The accusation was that the defend-

ant had made an assault and battery upon a third party with words. The case was tried before the justice—but whether or not with the aid of a jury the record fails to show—and the defendant was found guilty, and fined \$5. From this judgment she appealed to the district court of Santa Fe county. At the next term of that court, following the perfection of her appeal, she being duly represented by counsel, her case was set for trial. Upon the day thus set for trial, when the case was called, the territory, and the appellant, by her attorney, announced themselves ready for trial, but it was then ascertained that the appellant was not personally in court; whereupon, the territory had the appellant three times duly called, and, not responding, the district attorney moved the court to affirm the judgment of the lower court. Upon this motion the court made the following order of record: “It is, therefore, considered and adjudged by the court that the judgment in this cause of the justice of the peace of precinct number 4, of Santa Fe county, be, and the same is hereby, affirmed, and that in accordance therewith said defendant do pay unto the territory of New Mexico the sum of five dollars, the amount of her fine, together with the costs of the prosecution against her, as well in the lower court as in this court, to be taxed, and that execution issue therefor; that said defendant stand committed to the common jail of Santa Fe county until said fine and costs be fully paid and satisfied, and that a warrant of commitment issue against her.” Afterward, her attorney moved the court for a new trial and in arrest of judgment, which being overruled, she prosecutes her appeal to this court, and alleges as error the overruling of her motions for a new trial and in arrest of judgment; the sustaining the motion of the appellee’s district attorney to affirm the judgment of the lower court; in rendering a judgment against the appellant by default on a criminal charge for misde-

meanor; in refusing to hear and determine appellant's case de novo in the district court; and in refusing her a trial by jury in said court.

The above statement fairly presents the essential portions of the record. Whether or not the district court committed error depends entirely upon the relation existing between that court and the justice's court in criminal matters. If the district court, as to matters wherein the justice's court has original jurisdiction, is simply a court for the correction of errors, and acts in an appellate character, then, possibly, in case a defendant took an appeal from the decision of a justice court, and failed to appear when his case was called for trial, the court could affirm the judgment of that court. But it is quite evident that the district court is in no sense of the word an appellate court for the purpose, simply, of passing upon errors of law. If it can take cognizance of criminal matters at all which are triable originally in the justice's court, it does so to try them de novo. The Compiled Laws of 1884 are very indefinite as to the right of appeal from the justice's court to the district court in criminal matters; and while that right probably exists, yet the method of its exercise is only to be arrived at by inference.

It might be contended that section 2395 of the Compiled Laws of 1884, together with rule 16 of rules of district courts, gave the district court authority to rule as it did in this case; and it will have to be conceded that, if that section of the Compiled Laws of 1884 and the rule cited are applicable to criminal cases, that the district court was correct in giving the judgment which it did. They provide, in substance, that "in all cases of appeal from a justice's court," "when the defendant below shall have taken the appeal, and shall fail to appear when the cause is regularly called on the docket, the plaintiff may have the appeal dismissed;

ASSAULT and bat-
tery: appeal from
justice's court
to district court:
trial de novo.

or, at his election, the plaintiff may have the judgment below affirmed, and judgment rendered for the same, with costs, against the defendant and his sureties." It is quite apparent that the district court in this case founded his decision upon the provisions above set out. We are clearly of the opinion that those provisions have relation solely to civil matters. Sections 2390-2395 of the Compiled Laws of 1884 have reference to civil cases; for whatever is appealed by virtue of them is to be tried in the district court de novo, and according to the rules prescribed for the government of justices' courts. It can hardly be contended that the legislature ever intended that in criminal matters in the district court there should be two systems of trial, and that the imperfect and crude methods of justice's court should supersede the full and perfect machinery of the district court. Rule 16 of the district court rules has plainly reference to civil matters. In the first place, the terms "plaintiff" and "judgment" are not those usually used in statutes or rules referring to criminal matters; they would be "territory" or "state" and "sentence;" in the second place, the rules purport to be for the common law side of the docket solely.

Conceding, then, that the right of appeal is given in criminal cases from the justice's court to the district court, by section 2414, Compiled Laws, 1884, it is the duty of the appellant, when such appeal is taken, to cause to be filed in the office of the clerk of the district court a transcript of the record of the proceedings had before the justice of the peace, together with the original oath, recognizance, and other original papers in the case. The clerk is required to docket the case for trial. All this has been done in this case. "When this is done, the cause is then in the court to which the appeal is taken, and is to be disposed of precisely like any other criminal case there pending. * * * The appeal stays the proceedings before the justice; and it does more,—

it transfers the whole proceeding to the court to which the appeal is taken, to be disposed of there de novo. After the appeal, the case is completely within the jurisdiction of the circuit [district] court, and * * * that court must dispose of the case as other criminal cases are disposed of." *Wiseheart v. State*, 4 N. E. Rep. (Ind.) 156. The case was then in the district court, to be tried by the same rules as those applicable to cases originating in that forum. The bond given for the appeal from the justice's court stood, as to the case appealed, in the same relation as an appearance bond in the district court upon an indictment found. It gave the district court no authority to affirm the decision of the lower court, but only the right to forfeit the bond for the nonappearance of the defendant. This was not done in this case, but judgment given upon the sentence of the justice. The district court has no authority to sentence a defendant without a trial by jury, unless upon a plea of guilty properly and legally entered of record. The sentence of the district court is, therefore, reversed.

O'BRIEN, C. J., and LEE, McFIE, and FREEMAN, JJ., concur.

[No. 395. On Rehearing. August 21, 1891.]

GUADALUPE S. DE GARCIA Y PEREA, APPELLEE, v. MARIANO BARELA, APPELLANT.

WILL—FRAUD—EQUITY—JURISDICTION OF DISTRICT AND PROBATE COURTS.

Section 10 of the organic act, providing that the judicial power of the territory shall vest in the supreme court, district courts, probate courts, and justices of the peace, and that the jurisdiction of the several courts "shall be as limited by law," does not confer chancery jurisdiction on probate courts. Such jurisdiction is inconsistent with the nature and scope of such courts. *Ferris v. Higley*, 20 Wall. 375. Therefore a suit by the wife of the testator against the administrator for relief from a receipt fraudulently obtained by him, by which she released her right in her deceased husband's estate, valued at \$6,000, being an equitable demand, was properly brought by bill in the district court.

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ID.—CODICIL, VALIDITY OF, POWER OF PROBATE JUDGE TO DECLARE.

Under sections 1446-1449, Compiled Laws, the probate judge has no power to declare a will or codicil invalid, not executed according to statute (sec. 1380, Comp. Laws, 1884). But it is his duty in such case, to return the will or codicil to the person presenting the same, without approval, indorsing thereon his reasons for withholding his approval; and such person may then present such will or codicil to the district court for a judicial determination of its validity, not by appeal, but by an original suit instituted in that court.

ID.—BEQUEST, CONSTRUCTION OF—PRESUMPTION.—A clause in a will bequeathing to the wife "all articles of goods in my house, personal furniture, household furniture, and all that exists therein," will be held to include money in an iron safe in the house, not mentioned in the will, where the husband has sufficient means; the presumption being that he intended to make ample provision for her, to whom he owed protection and support.

APPEAL from the Third Judicial District Court, Dona Ana County. Decree below for complainant, affirmed February 12, 1890, 5 N. M., page 458. Motion for rehearing. Motion overruled.

The opinion states the case on the rehearing.

WADE & RYNERSON and CATRON, KNAEBEL & CLANCY for appellant.

S. B. NEWCOMB for appellee.

LEE, J.—This is an application for a rehearing of this case, which was argued and decided at the January term, 1890. Upon the hearing of the cause, counsel for appellant contended that the court below had not jurisdiction to hear and determine the cause, for the reason that section 562, Compiled Laws, 1884, vested in the probate court exclusive original jurisdiction to determine all matters of controversy involved in the cause; and this court decided that, if said section 562 was susceptible of the construction claimed for it, said section was in conflict with section 1868 of our organic law, which provides that "the supreme court and the district courts, respectively, of every territory shall possess chancery as well as common law

jurisdiction.” The appellant insists that this court erred in its former opinion, and asks to have the cause reheard upon this and other grounds stated in the petition for a rehearing.

Section 10 of our organic act provides that “the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * *

WILL: fraud:
equity: juris-
diction of district
and probate
courts.

The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law. * * *

The supreme court of the United States, in *Ferris v. Higley*, 20 Wall. 375, clearly defined the meaning of the words, “shall be as limited by law,” and held that it was inconsistent with the nature and scope of probate courts to confer common law and chancery jurisdiction upon such courts in the territory of Utah, whose organic law, in this respect, is substantially like ours. To hold that the probate court of Dona Ana county was possessed of powers to give adequate relief in this case would be to decide that such court possessed chancery jurisdiction. The circumstances of the case and the relief sought are of equitable cognizance, and such as could only be relievable in a court possessing chancery jurisdiction. In any view of the case, the jurisdiction of the probate court is only exclusive as to claims against an estate not exceeding \$100. The appellee’s claim against the estate under the will was for money devised to her, which amounted to some \$6,000; therefore she could, under section 562, bring her suit in the district court in the first instance. Ordinarily such a suit would be at law, but in this case the appellee had a right to sue on the equity side, in order to get relief from the receipt which she insists the appellant fraudulently obtained from her; and

equity, being properly invoked for the one purpose, would retain jurisdiction for all purposes necessary to give her complete relief in respect to that claim. The provision of the act of congress, that "the supreme court and district courts, respectively, of every territory shall possess chancery as well as common law jurisdiction," excludes the idea that the probate courts shall have exclusive jurisdiction in cases where equities are involved. Nor would a due regard to public policy and the protection of estates of decedents justify the grant of such extensive powers to probate courts as constituted in New Mexico.

The appellee contends that the appellant had an adequate remedy by appeal from the action of the probate court. We do not think so. The subject of this controversy was some \$6,000, which appellee claims was left her by the will of her deceased husband, and that the appellant took possession of the money, and fraudulently obtained from her a receipt for all claims against the estate; that the appellant made no mention of this money in the inventory filed by him in the probate court, but claimed the same belonged to his mother and himself as residuary legatees named in the will. These facts present a case of purely equitable cognizance. She might have taken steps for the protection of her rights in the probate court; but can it be said that the remedy afforded in that court was as ample and adequate as that of the district court. Even the district court would have been powerless to have given her relief under a common law proceeding.

CODICIL, validity
of, power of pro-
bate judge to
declare.

Sections 1446-1449 limit the power and prescribe the duty of a judge of probate with respect to the probate of the will.

Under these sections the probate judge can not declare a will or codicil invalid because the will was not executed according to the statutes; but if he shall have doubt as to whether the will ought to be approved on

account of its not being executed according to the statutes, he should note his doubts at the foot of the will, and return it to the person presenting the same, and such person may then present the will to the district court for a judicial determination of its validity. This is not done by way of an appeal, but may be by an original suit instituted for that purpose in the district court. In this case a codicil of the will was attested by but two witnesses. The statute requires three. The probate judge, however, approved the codicil, notwithstanding its defective execution. If the probate judge has not power to declare a will or codicil invalid because it is not executed under the solemnities prescribed by statute, we think it follows as a necessary corollary of that proposition that such court would not have power to judicially determine that such will or codicil was valid. Could the probate judge, by approving a codicil to the will, which was invalid under our statute, deprive the parties interested of the right to have the validity of the codicil judicially determined by the district court? It was the duty of the probate judge, when the will was presented to him for probate, having the codicil thereto, which codicil was attested by only two witnesses, to have returned the will to the appellant without approval, and to have indorsed thereon his reason for withholding his approval. Then the appellant could have presented the matter to the district court for a judicial determination of the question, as it is provided in section 1449 that any proceedings had by said judge of probate, not in conformity with the provisions of this act, shall be declared null and of no effect by the district court. The statute does not prescribe the proceedings in which this may be done, and, therefore, to give effect to the statute, there is no reason that it may not be done in any case in which the question may be made an issue. We do not mean to say that in no case

could the probate judge admit to probate and approve a will or a codicil of the will. But if the will and codicil presented to the probate judge appeared to that court to have been executed and attested in the manner required by statute, he could give it his approval; but such approval would be in the exercise of an administrative, and not a judicial, function, and, notwithstanding his approval, a party interested in the will could invoke a judicial determination by the district court as to whether the will was or was not executed and attested as required by statute.

It is contended by the appellants in their motion that the organic act confers an exclusive probate jurisdiction on the probate court, which the legislature is authorized to define. The federal supreme court, in the case referred to, does not so construe it. Justice MILLER, in the opinion, says: "Of the probate courts it is only said that a part of the judicial power of the territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in jurisprudence of this country." But it is claimed that, if the organic act had not conferred such exclusive jurisdiction, this legislature could rightfully do so without conflict with the act of congress. This proposition is correct, provided they have not attempted to confer upon it powers not authorized by the organic act, as it is construed by the supreme court, as before referred to. The organic act provides that the district courts shall have and exercise the same jurisdiction under the constitution and the laws of the United States as is vested in the circuit and district courts of the United States. And the supreme court, in construing the act for the territory of Washington, where the same terms are used, held that the jurisdiction thus conferred is the same as that exercised by the circuit and district courts

of the United States in all branches. The City of Panama, 101 U. S. 453. And the equity jurisdiction conferred on the federal courts is held by that court to be the same "that the high court of chancery in England possesses, and is subject to neither limitation nor restraint by state legislation." The court is bound to exercise the jurisdiction if the bill, according to the received principles of equity, states a case for equity relief. "The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case as disclosed by the pleadings. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." "It is very evident that an action at common law on the bond of the administrator would not give the complainant a practical and efficient remedy for the wrongs which she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the groundwork of this bill, or to furnish proper relief against it. It is, however, well settled that a court of chancery, as an incident to its power to enforce trusts and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands. The bill under review has this object, and nothing more.

"It is true, the bill seeks to open the settlement with the probate court as fraudulent, and to cancel the receipts and transfers from the complainant to the administrator because obtained by false representations, but the determination of these questions is necessary to arrive at the proper value of the estate." *Payne v. Hook*, 7 Wall. 425. This case is fully sustained by various other decisions of the supreme court of the

United States. It covers every point involved in the question of jurisdiction of the court to entertain the bill and give the relief demanded; and we find that the same rule of equity jurisdiction is fully recognized and exercised under state authority in a number of the states, especially where probate jurisdiction is not exercised by one of the higher courts. Mr. Pomeroy, in the third volume, section 1152, of his admirable work upon Equity Jurisprudence, has carefully reviewed this question, and has collected the decisions of the several states and grouped them into three classes: "In the states of the first class the original equitable jurisdiction over administrations remains unabridged by the statutes concurrent with that possessed by the probate courts. These states are Alabama, Illinois, Iowa, Kentucky, Maryland, Mississippi, New Jersey, North Carolina, Rhode Island, Tennessee. In the states of the second class the jurisdiction of the probate courts over everything pertaining to the regular administration and settlement of decedents' estates is virtually exclusive. These states are Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, Oregon, and Pennsylvania. In the states of the third class the equitable jurisdiction is not concurrent, but is simply auxiliary or ancillary and corrective. The probate court takes cognizance originally of all administration, and has powers sufficient for all ordinary purposes. Equity interposes only in special or extraordinary cases, which have either been omitted from the statutory grant of probate jurisdiction, or for which its methods and reliefs are imperfect and inadequate, or where its proceedings have miscarried and require correction. This class includes Arkansas, Missouri, New York, Ohio, California, Georgia, Kansas, South Carolina, Tennessee, Texas, Vermont, and Wisconsin." An examination of the authorities cited by Mr. Pomeroy shows that even in

some of the states of the second class, where the jurisdiction of the probate court is exclusive, as well as in all the states of the first and third classes, equity has jurisdiction of matters and relief incidental to the regular course of administration which are distinctively of equitable cognizance, and for which the methods and remedies of the probate court are imperfect or inadequate.

It is claimed in the motion for a rehearing that the court was mistaken in holding that fraud had been practiced upon the appellee, or that she had been unduly influenced to execute a receipt in full for all claims against the estate of her late husband, and that the judgment below should have been reversed for that reason. This is a pure question of fact which the master found from the evidence, and, as a general rule, the appellate court will not reverse upon a question of fact which the court below has found from conflicting evidence where the record shows substantial evidence sustaining the conclusion. There is evidence tending to show that the appellee was an ignorant woman; that her fears had been aroused that if she did not agree to the settlement proposed she might lose the place upon which she was living. And, taking all the evidence together, we are not prepared to say that the findings of the facts upon which the decree was based was not correct.

Counsel for appellant also contend that the translation of the fourth clause of the will, upon which the court predicated its construction of said clause, is incorrect. This translation was the one adopted, or at least acquiesced in, by counsel on both sides. The record (page 293) shows this admission: "It is hereby admitted that exhibit 8 is the sworn translation of the will of Pedro Garcia y Perea, by Pinito Pino, and that the same may be introduced as such." No objection was made to the

BEQUEST, construction of:
presumption.

introduction of the translation, nor was any other evidence offered to show that such translation was not correct. Pedro Lassaigue, parish priest, a witness for appellee, upon this point testified as follows: "Question. You understand the Spanish language well? Answer. Yes. Q. What do you infer from the word in the fourth clause from the last six words in the clause, namely, 'y todo lo que alli exesti?' A. I construe those words to mean, 'Everything in the house at that time.'" And on cross-examination: "Q. You will look at the translation which I hand you [Exhibit number 8] of the fourth clause of Pedro Garcia y Perea's will. State whether it is a correct translation or not. A. I think it is correct; strictly so. Q. You have been called upon to translate certain portions of this will from Spanish into English by Judge Newcomb. Is it not a fact that your knowledge of English is very imperfect, and that you have repeatedly found it necessary during your examination here to deliver your testimony through an interpreter? A. Certainly." Appellant now contends that the proper translation of the phrase is, "and all which there exists," and that "there" refers to "in my house" and nothing more; and that appellee, under the words, "and all which there exists," would only be entitled to take such things as were ejusdem generis with "all articles of goods, personal furniture, and household furniture," which were particularly mentioned. But, conceding that the translation now contended for is the correct one, can we assent to the proposition that the testator intended to leave the money in the safe to his residuary legatees, and not to his wife? We do not think the rule ejusdem generis applies to the case. That rule is defined by the supreme court as follows: "It is doubtless true that in the construction of wills as well as of statutes, where certain things are enumerated, and a more general description is complied

with, the enumerated description is commonly understood to cover only things ejusdem generis with the particular things mentioned." Given v. Holton, 95 U. S. 598. The rule is not an arbitrary one, and is only to be invoked to give effect to the intention of the testator when the language used is uncertain. If he had said, "the safe and all therein," it would hardly be contended that it did not include the money in the safe. How much less specific are the words used. "I also grant to my wife, already referred to, all articles or goods in my house, personal furniture, household furniture, and all that therein exists." The iron box or safe was in the house. The money was in the safe. It therein existed. Therefore, according to the plainest acceptation of the terms, or according to the strictest rules of logic, it was included in the bequest. The technical rule invoked could not change plain language, or give a different meaning to words from that which they clearly import. The testator was an ignorant man, that could neither read nor write. The draughtsman of the will was not a lawyer, or a man learned in the use of technical words. He testifies that he wrote it down as the testator directed him to do. In order to determine the intention of the testator we must consider the language, the circumstances under which it was used, the relation and the condition of the parties. Where a testator has sufficient means, in making a will, the presumption is that he will make ample provision for his wife. This presumption arises from the fact that he owes her protection and support as well as affection. The presumption may be overcome by proof that he was actuated by motives of a different character. But there was no evidence in this case of that character, though the master received oral testimony as to the intention of the testator, and finds from that evidence as a matter of fact that he intended leaving the money in the safe to his wife. We think

the result of the conclusion before reached is correct. The motion for rehearing will, therefore, be overruled.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ.,
concur.

[No. 433. August 21, 1891.]

CHARLES H. GILDERSLEEVE, PLAINTIFF IN
ERROR, V. ADA I. ATKINSON, ADMINISTRATRIX
OF ESTATE OF H. M. ATKINSON, DECEASED,
DEFENDANT IN ERROR.

WITNESS—TESTIMONY AS TO TRANSACTIONS WITH DECEDENT—SEC. 2082, COMP. LAWS, 1884.—In a suit against an administratrix for an alleged balance due plaintiff for land sold to defendant's intestate, the testimony of plaintiff as to his agreement with the deceased has no validity, under section 2082, Compiled Laws, unless corroborated by other material evidence.

Id.—DEPOSITION OF WITNESS ABSENT FROM TERRITORY.—Section 2095, Compiled Laws, 1884, providing that where a witness is absent from the territory his deposition may be taken "to be used in any court in all civil cases," applies as well to depositions taken for use in the probate court as in the district court.

Id.—VERDICT, WHEN THE COURT MAY DIRECT.—Where there is no evidence for the jury, or where the evidence is such the court, in the exercise of a sound discretion, would be called upon to set aside the verdict, and grant a new trial, if found for one party rather than the other, it is not only the right, but the duty, of the court to direct a verdict accordingly.

ERROR, from a judgment in favor of defendant, from the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

GEORGE C. PRESTON and H. BURNS for plaintiff in error.

For authority for taking depositions for use as evidence in the courts of this territory, see sections 2095 to 2110, inclusive, of Compiled Laws, 1884.

By section 10 of the organic act, a portion of the judicial power of the territory is vested in the probate courts. Comp. Laws, p. 49; sec. 1907, Rev. Stat. U. S., p. 70, Comp. Laws.

The jurisdiction of such courts are such as may be limited by law. Sec. 1866, Rev. Stat. U. S., p. 62, Comp. Laws.

Probate courts have original jurisdiction over many matters in this territory. Secs. 562, 656, and 1399, Comp. Laws, as amended by act February 26, 1889, Laws of 1889, pp. 216, 221, also secs. 28-30 of said act.

As to construction of legislative acts, see *United States v. Kirby*, 7 Wall. 482; *Richards v. Dagget*, 4 Mass. 534; *Orndoff v. Turman*, 2 Leigh. 200, 21 Am. Dec. 608; 1 Kent, Com. 462; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788.

It has been held that the corroboration required may be "by any other evidence legally bearing on the subject-matter of the cause, tending to give probability to the statement of the one witness rather than that of the defendant, and thereby producing conviction of its truth." *Bent v. Smith*, 22 N. J. Eq. Rep. 560, 566; 1 Greenl. Ev., sec. 260, and notes; 2 Story, Eq., sec. 1528.

Any evidence, fact, or circumstance, that will tend to corroborate the evidence of a party in an action against the estate of a decedent, is admissible, and its weight and sufficiency, when admitted, is for the jury alone. *State v. Walcott*, 21 Conn. 271; *People v. Melvane*, 39 Cal. 614.

It is not necessary that the testimony of an accomplice shall be corroborated as to every material fact; a corroboration as to some material fact is sufficient. *State v. Allen*, 10 N. W. Rep. (Iowa) 805; *People v. Ogle*, 11 N. E. Rep. (N. Y.) 53.

In cases of accomplices the corroboration may be

by circumstances alone. *People v. Elliott*, 11 N. E. Rep. (N. Y.) 602. See, also, *Commonwealth v. Holmes*, 127 Mass. 441; *Territory v. Kinney*, 3 N. M. (Gil.) 144; *People v. Melvane*, 39 Cal. 614; *People v. Clough*, 73 Cal. 338.

The jury is made the sole judge of the weight of the evidence, and where there is any evidence upon which the verdict of a jury can be sustained it is error to take the case from the jury. Sec. 2055, Comp. Laws; *Kirchner v. Laughlin*, 4 N. M. (Gil.) 386; *Greenleaf v. Birtle*, 9 Pet. 292.

As to the practice of moving the court to instruct a jury to return a verdict in favor of the mover, see *Pawling v. United States*, 4 Cranch, 219; *U. S. Bank v. Smith*, 11 Wheat. 171; *Parks v. Ross*, 11 How. 362; *Schuchardt v. Allens*, 1 Wall. 359.

A party has no right to demur to evidence, or to have the jury instructed to return a verdict in his favor after he has introduced evidence to disprove the facts sought to be established by his adversary. *Fowle v. Common Council*, 11 Wheat. 320.

If there is any evidence to prove an issue, the question must be left to the jury; and if the jury err, the remedy is by a motion for a new trial, not by a writ of error. *Schuchardt v. Allens*, 1 Wall. 359; *Ranney v. Barlow*, 112 U. S. 207; *U. S. v. Tillotson*, 12 Wheat. 180; *Hickman v. Jones*, 9 Wall. 197; *Manchester v. Ericsson*, 105 U. S. 347.

An instruction by a court to the jury to find a verdict for a party, should only be given when there is no conflicting evidence. *Monlor v. Ins. Co.*, 101 U. S. 708.

Where a cause fairly depends upon the effect or weight of testimony, the cause should not be withdrawn from the jury. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Conn. Ins. Co. v. Lathrop*, 111 U. S. 612.

F. W. CLANCY for defendant in error.

The testimony of the plaintiff in error was not corroborated by any other material evidence, as required by statute. Sec. 2082, Comp. Laws, 1884.

As to what constitutes a corroboration by other material evidence, see Anderson's Law Dict.; 2 Bouv. Law Dict. 167, title "Materiality." See, also, *Maddox v. Sullivan*, 2 Rich. Eq. 6; *State v. Raymond*, 20 Iowa, 287; *Best on Ev.*, sec. 609; *Greenlf. on Ev.*, sec. 257, note; *State v. Buckley*, 22 Pac. Rep. 838.

Where contracts have been reduced to writing, conversations of the parties controlling or changing their stipulations, are, in the absence of fraud, no more received in a court of equity than in a court of law. *Willard v. Taylor*, 8 Wall. 573; *Hill v. Wilson*, 7 Moak, 459, 460. See, also, 1 *Greenlf. Ev.* 282.

From none of the alleged corroborative evidence standing alone can any conclusion as to the truth of the fact be deduced, nor would any of it, independent of plaintiff's evidence, tend to show the same result. *Commonwealth v. Bosworth*, 22 Pick. 399; *Hill v. Moak*, 459, 460.

The taking of depositions of nonresident witnesses for use in the probate court is not authorized by law. Secs. 2095 to 2110, Comp. Laws, 1884; *Matter of Whitney*, 4 Hill, 534.

An instruction by the court to the jury to find in favor of a party, is always proper when a different verdict would not be allowed to stand. *Marion County v. Clark*, 94 U. S. 278; *Bowditch v. Boston*, 101 U. S. 18; *Montclair v. Dana*, 107 U. S. 162; *Pleasants v. Fant*, 22 Wall. 120. See, also, *Railroad Co. v. Jones*, 95 U. S. 440, 443.

The plaintiff could not testify in his own behalf in this case. Sec. 858, Rev. Stat. U. S.; sec. 2082, Comp. Laws, 1884.

SEEDS, J.—This was a suit begun before the probate court in and for Santa Fe county, at the September term, 1887, against the administratrix of the estate of H. M. Atkinson, deceased, in which the plaintiff, Gildersleeve, claimed the sum of \$10,118.60, as due him from the estate “on account of cash loaned,” to wit, \$118.60, “and the sum of \$10,000, * * * on account of a balance due your petitioner as a part of the purchase price or consideration of an interest in the Anton Chico grant deeded by your petitioner to said deceased in the early part of the year, 1883.” The administratrix admitted the claim for \$118.60, but denied that for \$10,000. The probate court found in favor of Gildersleeve for the whole amount, and gave judgment accordingly. Thereupon the administratrix appealed the case to the district court of Santa Fe county, where it was tried before a jury.

When the plaintiff had closed his introduction of evidence, the defendant moved the court to instruct the jury to find a verdict for the plaintiff, Gildersleeve, for \$118.60, the amount admitted to be due, and for no more. The motion was granted, and a verdict and judgment given in accordance therewith. The plaintiff then filed the usual motion for a new trial, which, being duly considered, was denied. The plaintiff then gave notice of and perfected his appeal to this court. By an agreement found in the record, the deposition of one S. S. Burdett, who was living in Washington, D. C., was taken for use in the trial in the probate court upon the part of the plaintiff; but by that agreement the defendant reserved the right to object to the introduction of the same upon the ground, among others, that there was no provision of law in this territory for using a deposition taken outside the territory in a probate court. The deposition in question was taken by a commissioner for this territory in the city of Washington, D. C. The district court took the view advanced by the

defendant, and refused to allow the deposition to be read. The plaintiff in error makes the following assignment of errors: First, instructing the jury to find a verdict in his favor for only \$118.60; second, refusing to submit plaintiff's claim for \$10,000 to the jury; third, overruling his motion for a new trial; fourth, refusing to allow him to prove the value of his interest in the Anton Chico grant, and the value of the lands conveyed by him to H. M. Atkinson; fifth, refusing to allow him to read the deposition of S. S. Burdett to the jury. Under these assignments of error, there are but three questions important to be considered, and they are these: First. The plaintiff, under section 2082 of the Compiled Laws of 1884 of this territory, being precluded from obtaining a judgment unless his evidence is "corroborated by some other material evidence," was there such corroboration in this case as the statute requires? Second. Is there any provision, under the laws of this territory, for taking the deposition of a witness out of the territory for use in the probate court? And, third, was the court justified in this case in instructing the jury to find for the plaintiff for \$118.60, or should it have submitted the whole case to them?

The plaintiff filed his claim before the probate court in the form of a petition. That petition, then, is the pleading upon which his case must rest. It is the same as a declaration in a common law case in the district court, and limits and controls the evidence which he is allowed to offer. He can not go outside the fair intendment of its allegations in the introduction of his evidence. His proof, in other words, must respond to his allegations, and tend to prove them. Unless it does thus tend to prove the allegations, and is confined to the point in issue, the evidence is clearly immaterial. This is elementary, and needs no elaborate citation of authorities to sustain it. 1 Greenl. Ev. [13 Ed.], sec. 51.

What were the allegations in his petition? We quote from it those portions necessary to a correct

understanding of this controversy: "That the estate * * * is justly indebted to your petitioner in the sum of \$10,118.60; that the sum of \$118.60 is due on account of cash loaned, and the sum of \$10,000 is due on account of a balance due your petitioner as a part of the purchase price or consideration of an interest in the Anton Chico grant deeded by your petitioner to said deceased in the early part of the year 1883." He then goes on to state that, at the time of the delivery of the deed for the grant to the deceased, they had an accounting, and the deceased promised to pay the plaintiff the said sum of \$10,000, and that the plaintiff was to be interested with the deceased in said grant, or sale thereof, to the extent of said \$10,000. The defendant confessed the indebtedness of \$118.60, but denied the other allegations of the petition. What, then, was the

WITNESS: testimony as to transactions with decedent.

point at issue? Clearly, as to whether the Atkinson estate owed Gildersleeve \$10,000 as a balance upon the purchase price or consideration for plaintiff's interest in the grant sold. Mr. Gildersleeve was a witness in his own behalf, and testified that he first made a contract in 1882 to sell his interest in the grant to Atkinson for about \$12,000; that when the sale was finally consummated Atkinson agreed to pay him \$10,000 in addition to the \$12,000 when he (Atkinson) should sell the grant. Continuing, he said: "The \$10,000 he was to pay me when he should realize," etc., "was to be regarded as a part of the consideration for the conveyance that I made to him, and payment of attorney's fees rendered by myself," etc. The evidence in regard to the attorney's fees, by his own statement, in no way enters into the consideration or interest in the grant; for he says that the \$10,000 was for "part of the consideration," and for attorney's fees. What allegation is the evidence in regard to the attorney's fees responsive to, or does it in any manner tend to prove the issue here raised? It

is certainly not responsive to the allegation set out in the petition, nor does it in any way tend to meet the issue raised. But, conceding that the whole of his evidence proves, at least in part, the issue offered by himself, yet, as he is testifying about transactions with a man whose lips are forever sealed, is his evidence corroborated as required by the statute?

Section 2082, Compiled Laws, 1884, provides that no verdict, judgment, or decision shall be obtained on such evidence, unless it "is corroborated by some other material evidence." What, then, is material corroborating evidence? The term "corroborating evidence," as found in the books, is used in two distinct senses,—the one general; the other special or technical. In the general sense, it is used when we say that in any case, and as to any evidence, it was or was not corroborated.

In this sense the evidence has no other function than to aid other evidence of a like or different character in giving it additional weight. Such other evidence, so aided, may or may not be sufficient of itself; that is a question solely for the jury. General corroborating evidence may corroborate any material evidence already in, whether that evidence goes directly to the issue or necessary legal elements in the case, or to giving solidity to a link merely in the chain of proof. In the special or technical sense of corroborating evidence, upon the other hand, we are dealing with a substantive quantum of evidence without which the case of the party who is compelled to produce it must inevitably fail. Its materiality goes to the very core of the case. The character of this species of evidence, too, is generally the creation of statute. We find special or technical corroborative evidence necessarily present in, at least, three distinct classes of cases: First, in criminal cases where it is sought to convict an accused upon the testimony of an accomplice alone. In such cases the evidence of the accomplice must be

corroborated as to its material facts; and the material facts which must be corroborated are not those alone which would tend to sustain the credibility of the accomplice simply, but they must have reference to the corpus delicti, or tend to connect the defendant with actual participation in the offense charged. 1 Greenl. Ev., sec. 381, and note; 1 Bish. Crim. Proc., secs. 1169, 1170. Other facts testified to by the accomplice may be corroborated, but it simply goes in as general corroborative evidence, reaching merely to his credibility, and is not special corroborative proof. State v. Maney, 6 Atl. Rep. (Conn.) 401, 403. The law in regard to corroborating accomplices exhibits in its evolution very strikingly the difference between general and special or technical corroboration. At common law, a jury was at liberty to find an accused guilty upon the uncorroborated testimony of an accomplice; though it was the custom of the judges to caution the juries against so doing, and urge upon them the necessity of requiring corroborating evidence, or acquitting. 1 Bish. Crim. Proc., sec. 1169; People v. Clough, 73 Cal. 348. The corroborating evidence, as thus used, was of the general class; for without it the jury could convict. But, the character of an accomplice's testimony being so evidently corrupt, many states have by statute provided that it should not be sufficient, of itself and uncorroborated, to base a conviction upon. Hence the corroborating evidence in such jurisdictions becomes special or technical, because without it the accomplice's evidence is a nullity. Second, we have the technical corroborating evidence in civil cases where the testimony is given by a witness as to some transaction with a party dead at the time the evidence is required, as against an executor or administrator, or where the executor or administrator is the party plaintiff, and the party testifying is interested in the event of the controversy. In some states in such cases the inter-

ested party is not permitted to testify at all. That is the rule in the United States courts. The case before us comes within this class. The witness may be strictly honest, yet his testimony is insufficient, unless corroborated. The corroborating testimony gives vitality to the evidence to be corroborated. The tendency now in the states in this class of cases is to absolutely refuse the interested party the right to testify; hence the character of the corroborating evidence must be in this, as in criminal cases, something other than that which goes to the credibility of the witness solely. The third class of cases in which technical corroborating evidence is required is in proving wills, and, in some jurisdictions, in proving the signature to deeds. The wills are usually of no validity whatever, though signed by the testator, and though the signature is abundantly proven by parties who saw it signed, unless those parties signed the will as witnesses. Their evidence, then, is corroborative of the testator's signature, and gives it validity. There are two other illustrations of this difference in the use of the term "corroborating evidence," which may well be adverted to,—that in reference to an answer in chancery and in cases of perjury. It is laid down that it takes more evidence than one witness to overcome an answer in a chancery case, or to convict in a case of perjury. It need not be two witnesses, but one witness and some other legal evidence. 1 Greenl. Ev., secs. 257, 260; State v. Raymond, 20 Iowa, 582. Yet the corroborating evidence in this class of cases is not of the technical kind, but of the general; for in neither case is it called in to give vitality to the principal evidence, but simply to overcome a state of equilibrium in which the case is found. One witness alone, in reply to a chancery answer, leaves the case balanced. Both parties are equally credible; hence any amount, however slight, of general corroborating testimony, will overcome the answer.

So, in perjury, it is one oath against another, which in civil cases would fail to make out a case, and, of course, in a criminal case would be fatal. *Bent v. Smith*, 22 N. J. Eq. 566. But the law does not in effect say in perjury cases that the testimony of the witness has no validity unless corroborated, but simply that it has no more validity than the oath it attacks; hence there can be no conviction. It follows that any rule as to the materiality or efficacy of corroborating evidence drawn from cases of answers in chancery suits, and in perjury cases, can not be the true rule, where we are seeking for a correct guide in cases where the testimony has no vitality of any kind without corroborating evidence. In such cases the testimony must go, not alone to the credibility, but to the proof of some substantive fact, without which the case of the plaintiff must fail. The rule, then, as to corroborating evidence, as applicable to this case, and those similar to it, must be deduced from cases which deal with special or technical corroborative evidence. This will necessarily exclude those criminal cases in reference to perjury, and those regarding accomplices where the testimony is not regulated by statute, and cases of answers in chancery. The rule, too, will be the same in principle, whether referring to a criminal or civil case; for it goes simply to the introduction of the evidence, not to its weight. The court is first to determine whether there is any corroborating evidence; its weight is then for the jury. Keeping in mind the requirements of the statute above cited, that the evidence must be "some other material evidence," the rule fairly deducible from the adjudged cases may be thus announced: Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or

issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue. *State v. Lawlor*, 9 N. W. Rep. (Minn.) 698; *State v. Buckley*, 22 Pac. Rep. (Or.) 838; *Com. v. Holmes*, 127 Mass. 424; *People v. Melvane*, 39 Cal. 614; *People v. Clough*, 73 Cal. 348; *State v. Raymond*, 20 Iowa, 582; 1 Am. and Eng. Encyclopedia of Law, "Accessory," 77, 79, and notes.

What, now, in view of this rule, as applied to the point in issue in this case, is the corroborative evidence relied upon to support Mr. Gildersleeve's testimony?

First. The deed executed by himself and others to Atkinson. The purchase price or consideration mentioned therein, and which is *prima facie* the true consideration, was \$62,500. He testifies that his interest was one sixth, and that he received from Atkinson about \$12,000. The deed seems to corroborate his testimony that he sold his interest in the grant for about \$12,000, but it does not corroborate the allegation that after the sale he still had an interest in the grant, or that the purchase price was still unpaid. Rather, if it tends to prove anything, as it stands by itself, it is that he had parted entirely with his interest in the grant. Instead of supporting the issue raised, it militates against it.

Second. One witness testified that he at one time sought from Atkinson an option on the grant, and that he (Atkinson) told him that if anything might occur or would occur he should see Mr. Gildersleeve about it, "who was interested with him in the Anton Chico grant." This, it is contended, is corroborative evidence. But in what particular does it, of itself, tend

to prove that his interest in the grant was for the purchase price? And yet that is the only issue in the case. May it not have reference simply to the interest which he claims for attorney's fees? But there is no allegation or issue in the case to which that testimony is responsive.

Third. But it is urged that the testimony of Judge WALDO corroborates the plaintiff's evidence. The judge, in substance, says that he was talking with Atkinson about the interest which Gildersleeve claimed in the grant, but not in reference to attorney fees; and stated that Gildersleeve claimed that he had agreed with him (Atkinson) "to divide the profits—share the profits—with him on the sale of the grant," and that Atkinson had said that there would be mighty little left for Mr. Gildersleeve. Now, admit that this evidence tends to prove an interest in the grant belonging to the plaintiff, the question still remains, does it tend of itself to sustain the evidence of the plaintiff as to issue raised? That issue was that the estate of Atkinson owed him \$10,000 as part of the purchase price or consideration for the grant; the amount specifically stated, \$10,000. The evidence claimed as corroborative is simply as to an interest in the grant measured by profits,—it might be something or nothing. It was a contingent interest, and not covered by any allegation of his petition. In no way could it sustain the claim for a specific sum, as "part of the purchase price."

Fourth. The last evidence which is claimed as corroborative is the following letter produced by the plaintiff:

"SANTA FE, N. M., May 5, 1883.

"C. H. Gildersleeve, Esq.

"DEAR SIR:—In the event of sale of Anton Chico grant by me, as there is now a sale pending, I will from that, or any other sale, allow, to the extent of my

power, all reasonable attorney fees in connection with the procuring of a patent.

“Respectfully,

“H. M. ATKINSON.”

This letter was written after the sale to Atkinson of the grant, and refers solely to attorney's fees. It is true that Mr. Gildersleeve testified to an agreement for paying attorney's fees, but it was under objection, and there is no allegation in the petition to which his testimony in this regard is responsive, and therefore the letter can not be material or corroborative. The holding in this matter is not technical. Under the statutes of the territory, great liberality is allowed in amending of pleadings. The plaintiff made his own case. If he had not, in the first instance, fully alleged all that the state of his facts warranted, he could have had leave to have amended his petition. This he did not ask. The presumption is that he had alleged all that there was in his case. His testimony having no validity without being corroborated, and there being no evidence tending to corroborate it, the conclusion is inevitable that the assignment of error is not well taken.

2. Did the court err in excluding the deposition of S. S. Burdett? Section 2095 of the Compiled

DEPOSITION of
witness absent
from territory.

Laws of 1884 provides that it shall be lawful to take the depositions of witnesses “to be used in any court in this territory in all civil cases when the witness * * * is absent from the territory.” The probate court is one of the four courts provided by the organic act of this territory. That it is an important court goes without saying. Great interests are continually before it. The reasons for taking depositions for use in courts would seem to be just as pertinent to this class of courts as to any others, and if a general statute allowing the taking and use of depositions in courts would

seem to include the probate court, nothing but the peremptory requirements of other statutes forbidding it should justify an appellate court in depriving it of such a necessary adjunct of arriving at the proof in any given case. Section 2096 of the Compiled Laws provides whom the depositions may be taken before, and those persons are all officials of the territory.

The contention, then, is that the deposition of a party taken out of the territory can not be used in the probate court because the person who took it was not one of the parties named in section 2096. Section 2107, however, provides that depositions of witnesses "may be taken in all suits in this territory, according to the above provisions, by any disinterested person." Standing alone, this section would seem to cure whatever defect there might be in the previous sections. And this is the contention of the plaintiff. But the defendant insists that it plainly has reference to "the above provisions," which mean the sections just immediately preceding it, which have reference to depositions taken for use in the district court. But it must be apparent to a casual reader that that clause can, without doing violence to its meaning, have reference to all the preceding sections in regard to taking depositions, including section 2095. If it thus include that section, then, without doubt, the deposition in question could and ought to have been admitted in evidence as against this objection to it. All the sections referring to depositions preceding section 2107 were originally part of chapter 32 of the Compiled Laws of 1865. Section 2107 was passed as section 4 of chapter 4 of the Laws of 1878. When the laws were compiled in 1884, the compilers placed section 4 of that chapter in the Compiled Laws as section 2107, and changed its phraseology in one place to read "according to the above provisions." The words, as originally passed, were, "according to the provisions

of chapter 32 of the Compiled Laws of New Mexico." So that, as originally passed, this section could have referred to section 2095. It is true that the law of the legislature of 1878 in question had reference simply to suits in the district court, but as this section, by its very terms, referred to the whole chapter 32, and there was as much reason in principle that it should refer to probate courts as to the district court, we know of no canon of interpretation requiring us to exclude the probate court from the reason of the law when it is within its terms. We therefore hold that depositions could, under the statutes of the territory, be taken out of the territory, to be used in probate courts. It does not follow, however, that the court erred in excluding the deposition, though it was upon a wrong ground. The evidence of the deposition went entirely to the question of paying attorney's fees, an issue not raised by the pleadings, and hence could not have been corroborative. There was no error in refusing its admission.

3. Was there error in the court's instructing the jury to find for the plaintiff for \$118.60, and taking from them the consideration of the claim for \$10,000? We have seen that the defendant admitted the \$118.60, and there was no testimony as to the \$10,000 claim except that of the plaintiff. By section 2082 of the Compiled Laws of 1884, that evidence, not being corroborated, could not go to the jury. There was nothing for them to pass upon. The law is well settled that, where there is no evidence for the jury to pass upon, or where the evidence is of such a character that the court, in the exercise of its sound judicial discretion, would be called upon to set aside the verdict and grant a new trial, if found in favor of one party rather than the other, "it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a con-

VERDICT: when
the court may
direct.

venient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 16; *Commissioners v. Clark*, 94 U. S. 278; *Montclair v. Dana*, 107 U. S. 162; *Delaware, etc., Railroad v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569. Finding no reversible error in the record, the judgment of the lower court will be affirmed.

O'BRIEN, C. J., and LEE, McFIE, and FREEMAN, JJ., concur.

[No. 470. August 21, 1891.]

GERONIMO CANDELARIA, PLAINTIFF IN ERROR,
v. ATCHISON, TOPEKA & SANTA FE RAIL-
ROAD COMPANY, DEFENDANT IN ERROR.

DAMAGES—NEGLIGENCE—TRESPASS.—In a suit for damages against a railroad company for injuries received, by the plaintiff being struck and thrown from the track by its engine and train of cars, through the alleged negligence of its servants, where the evidence was that, at the time of the accident, the plaintiff was walking upon and along the track of the defendant company; that there was an open public road east of the track, and open spaces between the tracks, upon which the plaintiff might have walked with safety; that the train, at the time, was not moving at a greater speed than was allowed by law; and there was evidence, though conflicting, that the engineer and fireman, when they discovered the plaintiff upon the track, rang the bell, blew the whistle, and put the air brakes on, but not in time to stop the train and prevent the accident—Held: The plaintiff had no legal right to use, and there was no necessity for his walking along, the track of the defendant; and, in doing so, he assumed the risk of his conduct, and became a trespasser in law, for which action on his part he can not recover; and that, though the defendant, through its servants, may have been guilty of some degree of negligence on its part.

ID.—PUBLIC HIGHWAY—RAILROAD CROSSING, LIABILITY FOR FAILURE TO CONSTRUCT—EVIDENCE.—In such case, where the evidence was that plaintiff was walking along, not across, the track of the defendant, the fact offered to be proved by plaintiff, that the track crossed an

old public highway near where plaintiff was injured, at which point defendant failed to provide a crossing, could avail plaintiff nothing; and the court did not err in excluding evidence of such fact.

ID.—VERDICT, THE COURT MAY DIRECT, WHEN.—Where the trial court is satisfied from the facts established that there is no right of recovery in the plaintiff, to the extent that the court would be compelled to set aside the verdict, it may, without error, instruct the jury to find for the defendant.

ERROR, from a judgment in favor of defendant, to the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

B. S. RODEY for plaintiff in error.

H. L. WALDO for defendant in error.

McFIE, J.—In this action plaintiff seeks to recover damages for personal injuries done him by his being thrown from the railroad track of the defendant company by an engine and train of cars thereon, which he charges to have resulted from the negligent conduct of the servants of the defendant, and without any fault of his own. The declaration consists of three counts. The first count charges that the plaintiff in error was injured at a public crossing of the highway over the track of the defendant in error, while the plaintiff was crossing upon said highway, by the carelessness and negligence of the defendant's employees in the management of its locomotive and train. The second proceeds upon the ground that there was a public road formerly existing, from time immemorial, which the railroad company, in the construction of its road, had not restored, and that the plaintiff was unavoidably upon the track of the defendant, for the reason that defendant had failed to restore said road, and that while crossing the track he was injured by the carelessness and negligence of its servants. The third count

charges that, while the plaintiff was crossing defendant's railroad track with all due care and diligence, the defendant drove its train up to and across said highway, and in so doing no bell was rung nor whistle blown, as required by an ordinance of the town of Albuquerque, and the plaintiff was injured by the negligence of defendant's servants, etc. A trial was had in the court below at the May term, 1891, and resulted in a verdict in favor of the defendant, under instructions of the court. To reverse that judgment the plaintiff brings the cause to this court by writ of error.

The testimony in the court below in substance showed that the Atchison, Topeka & Santa Fe Railroad company run its line of railroad through the eastern portion of the city of Albuquerque, and that its main line and a number of side tracks and yards are within the limits of the town of Albuquerque; that upon the west side of the tracks of the Atchison, Topeka & Santa Fe railroad are a number of tracks of the Atlantic & Pacific Railroad Company; that the depot of the defendant company is toward the northern and business portion of the town, and that its yards and side tracks extend for a long distance south of the depot; that there is a regular crossing both for vehicles and persons over the tracks upon a street called "Coal avenue," which street has been extended both upon the east and west sides of the tracks of both the Atchison, Topeka & Santa Fe Railroad Company and the Atlantic & Pacific Railroad Company; that the next regular crossing south of Coal avenue is probably a distance of one mile; that the machine shops of the Atlantic & Pacific Railroad Company are upon the west side of the tracks and about one fourth of a mile south of Coal avenue; that upon the east side of the tracks and opposite the machine shops is a piece of ground that was, at the time of the accident, under fence; that a number of the employees of the railroad com-

panies lived upon the east side of the tracks, as did also others who were not employees of the companies; that both the employees and other persons were in the habit of crossing over the tracks of the defendant company wherever they saw fit to do so, without any regard to regular crossings, for quite a distance both above and below, and in front of the machine shops of the Atlantic & Pacific Railroad Company; that there was an ordinance of the town of Albuquerque, in force at the time of the alleged injury, reading as follows: "It shall be unlawful for any engineer or conductor or any other person having charge, either permanently or temporarily, of any railway engine or train of cars, to run any such engine, or permit the same to be run, within the town limits, without ringing the engine bell, or at a greater rate of speed while passing street crossings than six miles per hour, except when running north of Tijeras road and south of Iron avenue; and both the engineer and conductor of any train shall be liable for the same offense."

The testimony shows further that on the sixteenth day of June, 1888, the plaintiff approached the tracks of the defendant company from the east side, in the neighborhood of the machine shops of the Atlantic & Pacific Railroad Company, went upon the side tracks and the main line of the defendant company for a considerable distance, and while upon the main line walking north, he was struck by an engine and train of twenty-four cars, knocked from the track, and injured. He admits that he was not an employee of the railroad company, and says that he was going across the railroad on business of his own. There is some conflict in the testimony as to whether the bell upon the engine was rung and the whistle blown, or not. Two or three witnesses testify that they did not hear the whistle or the bell, but the engineer and fireman both swear that the whistle was blown and the bell rung, and that the

air brakes were set upon the train as soon as the fireman notified the engineer that there was a man on the track. The testimony shows that the train was moving at the rate of about five miles an hour at the time the accident occurred. It is also shown that upon the east side of the tracks there is a road, extending from Coal avenue down to the crossing below the machine shops, the exact distance not being shown. It is also shown that between the main line and the side tracks of the defendant company there are spaces sufficiently wide for persons to occupy them uninjured while trains are passing.

What is claimed to constitute the negligence of the defendant company in this case is the alleged omission of its servants to have the whistle blown and the bell rung, and use proper diligence to stop the train. The defense is that the plaintiff had no legal right nor license to be upon these tracks, and that, therefore, he was a trespasser upon the defendant's tracks at the time the accident occurred. The plaintiff admits that he was going across the tracks of the defendant upon his own business; and, therefore, he had not the license that an employee might have under certain circumstances, in being upon the tracks of the company. It is clear that there was no regular crossing over the tracks of the defendant at the place where this accident occurred; that persons approaching the tracks there were in the habit of crossing the tracks wherever they pleased, without any regard to any crossing; and it is not pretended that the company had any regular crossing there which invited or licensed persons to cross on their tracks. The testimony of some of the witnesses is that there were cars frequently standing upon the tracks there, and that foot passengers crossed wherever they could get through between the cars. Can it be contended that because persons were in the habit of crossing over

DAMAGES: negli-
gence: trespass.

the tracks wherever they pleased, without regard to the regular crossings (and for a long distance up and down the tracks this was done), this fact would constitute a legal right for them to be upon the tracks of the defendant? We think not. But the plaintiff in this case, while he testifies that he was crossing the tracks, shows by his own evidence that he was not crossing the track, but was walking upon the track of the defendant. Every witness that testifies as to the accident states that at the time it occurred the plaintiff was walking upon the track from south to north. The plaintiff himself, when asked if he was not walking straight up the track, admits that he was. It is also shown by the witness Baca that the plaintiff crossed from a switch to the main track, and had proceeded upon the main track but a few steps when he was struck by the train. The witness Sedillo says that he crossed the track to the west side; sometimes he walked on the track, and sometimes at the side of it; then, at one time, he crossed back. The plaintiff himself admits crossing the track, and walking upon and along the same. There is no contradiction of the evidence upon this point that the plaintiff, at the time he was struck by the train, was walking upon the track of the defendant, and using it for a public highway, and without any legal right or necessity for so doing. There was a public road—an open road—to the east of the side track, and there were open spaces between the tracks which could have been used by the plaintiff, and by using them no injury would have been done him; but he chose to go upon the tracks of the defendant for his own convenience, and in so doing he assumed the risk of his own conduct, and became a trespasser, in contemplation of law. In the case of *Toomey v. Southern Pacific Railroad Co.*, 24 Pac. Rep. 1074, which was a case somewhat similar to the one at bar, the supreme court of California, in a well considered opinion, says:

“The track was not a highway for pedestrians. The law holds a railroad company to a very high degree of responsibility for the safety of its passengers, and public convenience requires rapid transit. Such being the case, regard for the safety of the passengers, and common justice to the company, require that, except at crossings and similar places, the track should be kept clear. In some countries this is regarded as of such importance that it is made a penal offense to trespass upon a railroad track; and even at crossings there are gates and gate keepers to prevent people from crossing when trains are approaching. In this country there are no such regulations. The matter is left to individual good sense and responsibility; but it is none the less of grave importance that the track should be kept clear. The law does not sanction its use as a path or sidewalk; and, if people persist in using it as such, they must be held to be doing an act which is not lawful. This, which seems clear enough on principle, is fully sustained by authority.” In *Railroad Co. v. Hummell*, 44 Pa. St. 378, the court, per STRONG, J., said: “It is time that it should be understood in this state that the use of a railroad track, cutting, or embankment is exclusive of the public everywhere, except where a way crosses it. This has more than once been said, and it must be so held, not only for the protection of property, but, what is far more important, for the preservation of personal security, and even of life. In some other countries it is a penal offense to go upon a railroad. With us, if it is not that, it is a civil wrong of an aggravated nature, for it endangers not only the trespasser, but all who are passing or transporting along the line. As long ago as 1852, it was said by Judge GIBSON, with the concurrence of all the court, that a railway corporation is a purchaser in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the pro-

prietors of it, and of a license to use the highest attainable rate of speed, with which neither the person nor property of another may interfere." Similar language was used in *Mulherrin v. Railroad Co.*, 81 Pa. St. 375. In *Railroad Co. v. State*, 62 Md. 487, the court, per IRVING, J., said: "A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be; and anyone who travels upon such right of way as a footway, and not for any business with the railroad, is a wrongdoer and a trespasser." The plaintiff in this case being upon the track, using it for his own purposes as a public highway, the defendant did not owe him the duty of doing acts to facilitate his trespass or to render it safe. In the case of *Toomey v. Railroad Co.*, supra, it is further said: "It is to be observed here that we are not saying that the fact that he was a trespasser would justify the infliction of a willful or wanton injury upon him. It is well settled that the commission of a trespass does not justify the infliction of an injury by way of punishment or revenge, or out of mere recklessness. Nor are we saying that the railroad company is not bound to use ordinary care after seeing the dangerous position of a trespasser. What we say is that the company does not owe to a mere trespasser upon its track the duty of doing acts to facilitate his trespass or render it safe. In other words, it is not bound to provide any particular kinds of machinery or appliances for his benefit, or, when not aware of his presence, to give cautionary signals to notify him of the approach of its train."

We think that the law is well settled that a railroad company is only liable, in the case of the trespasser who has been killed or injured by its trains, for the negligence of the defendant's servants after the trespasser's presence upon the track has been discovered. The facts in this case present no such conduct as would

constitute negligence on the part of the defendant after plaintiff's presence was discovered. But suppose the defendant's servants to have been guilty of some degree of negligence, still the plaintiff is not entitled to recover, if he was guilty of contributory negligence. What is contributory negligence? "The more approved statement of the doctrine of contributory negligence is that the person can not recover for an injury to which he contributed by his own want of ordinary care." *Pierce*, R. R. 323, note 4; *Murphy v. Deane*, 101 Mass. 455; *Baltimore & Pa. Railroad Co. v. Jones*, 95 U. S. 439; *Beers v. Railroad Co.*, 19 Conn. 566; *Neal v. Gillett*, 23 Conn. 437; *Johnson v. Railroad Co.*, 20 N. Y. 65, 73, 6 Duer, 633; *Wilds v. Railroad Co.*, 24 N. Y. 430, 29 N. Y. 315; *Grippen v. Railroad Co.*, 40 N. Y. 34; *Carroll v. Railroad Co.*, 1 Duer, 571; *Moore v. Railroad Co.*, 24 N. J. Law, 268-284; *Runyon v. Railroad Co.*, 25 N. J. Law, 556; *Railroad Co. v. Terry*, 8 Ohio St. 570; *Railroad Co. v. Stallmann*, 22 Ohio St. 1; *Railroad Co. v. Elliott*, 28 Ohio St. 340, 353, 357; *Railroad Co. v. Whittaker*, 24 Ohio St. 642, 35 Ohio St. 627; *State v. Railroad Co.*, 24 Md. 84-104; *French v. Railroad Co.*, 39 Md. 574; *Railroad Co. v. Whittington*, 30 Grat. 805, 815; *Railroad Co. v. Anderson*, 31 Grat. 812; *Reeves v. Railroad Co.*, 30 Pa. St. 454, 464; *Harlan v. Railroad Co.*, 64 Mo. 480, 65 Mo. 22; *Railroad Co. v. Miller*, 25 Mich. 274; *Le Baron v. Joslin*, 41 Mich. 313; *Wright v. Telegraph Co.*, 20 Iowa, 195; *Sherman v. Stage Co.*, 24 Iowa, 515; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Carlin v. Railroad Co.*, 37 Iowa, 316; *Murphy v. Railroad Co.*, 38 Iowa, 539; *Lang v. Railroad Co.*, 42 Iowa, 677; *Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Cope-land*, 61 Ala. 376; *Railroad Co. v. Whitfield*, 44 Miss. 466-485; *Railroad Co. v. Johnson*, 38 Ga. 409-431; *Railroad Co. v. Carroll*, 6 Heisk. 347; *Railroad Co. v. Goddard*, 25 Ind. 185; *Railroad Co. v. Hunter*, 33

Ind. 335-356; Needham v. Railroad Co., 37 Cal. 409, 419; Robinson v. Railroad Co., 48 Cal. 409; Flemming v. Railroad Co., 49 Cal. 253; Deville v. Railroad Co., 50 Cal. 383; Hearne v. Railroad Co., Id. 482; Railroad Co. v. Grimes, 13 Ill. 585; Knight v. Railroad Co., 23 La. Ann. 462; Davies v. Mann, 10 Mees. & W. 546; Bridge v. Railroad Co., 3 Mees. & W. 244; Tuff v. Warman, 5 C. B. (N. S.) 740; Radley v. Railroad Co., L. R. 1 App. Cas. 754.

It has been repeatedly held on the highest authority that a person crossing a railroad track at the regular, recognized crossing is compelled to use his senses both of sight and hearing for his own protection; and if he fails to do so, and is injured, he is guilty of negligence that will defeat a recovery by him. A person crossing a railroad track at a regular crossing established by the railroad company is said to have a right or license to do so; but a person walking upon the track of the railroad company without authority, and using it for a public highway, is held to a much higher degree of diligence, and takes a greater risk than he who crosses the track at a regular crossing. In the case of Railroad Co. v. Houston, 95 U. S. 697, the court said: "If, then, the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the 'negligence, unskillfulness, or criminal intent' of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. And she was at the time on the private right of way of the company, where she had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased

from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity can not be cast upon the defendant. No railroad company can be held for a failure of experiments of this kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure." In the case of *Railroad Co. v. Jones*, 95 U. S. 439, the court says: "He was not an infant nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also had he been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down."

In the case of *Michigan C. Railroad Co. v. Campau*, 35 Mich. 468, Chief Justice COOLEY, in ren-

dering the opinion, says: "The intestate does not appear to have looked behind him at all. Had he done so, he would have seen an engine approaching upon him upon the track he had now stepped upon, and with such close proximity that, according to the testimony of the principal witness for the plaintiff, it struck him before he had taken more than five or six steps on the track. The plaintiff claimed that the engine was going at the time at a speed forbidden by law to be run at that point, and his witnesses estimated the speed at from twenty-five to thirty-five miles an hour. He also claimed that the persons in charge of the engine were acting recklessly, and were ringing no bell and giving no signals. Upon this part of the case it must, from the verdict, be assumed that the facts were as the plaintiff alleged. But, admitting this to be the case, the utter want of any foundation for a cause of action on the facts stated is too plain to render extended remarks necessary or profitable. The decedent had voluntarily placed himself in a position of great danger. He was making a highway of a railway track, where he had no lawful right to be, and upon which dangerous vehicles were constantly liable to pass. Under such circumstances he was called upon to exercise more than ordinary care and caution to protect himself against danger which was constantly imminent. Instead of this, he seems not to have availed himself of any precaution whatever. A passing train, which would have been likely to prevent the rumbling or the bell of another being heard, rendered the sense of hearing insufficient for his protection, and added to the necessity of looking about him with vigilance. When, under such circumstances, a person places himself upon a railroad track, with an approaching engine in plain sight, and without even taking the precaution of looking behind him, it is impossible, in speaking of his conduct, to characterize it by anything short of recklessness. If

the plaintiff can recover in a case like this, it is plain that the negligence of the injured party must be held immaterial in any conceivable case."

The law as stated in the above decisions is the well settled law of this country, as declared by the courts of the United States, as well as by the weight of a long line of decisions in the courts of the different states. It is useless to continue the citation of cases wherein it is held that a person crossing a track of a railroad company must use his senses, both of sight and hearing, and any other reasonable care for his own protection, and if he does not do so he is guilty of contributory negligence, and can not recover, although there may have been negligence in some degree on the part of the defendant; and also that, in the case of the trespasser upon the track, a much higher degree of care must be used.

Now, what are the facts in this case upon this point? The only evidence that the plaintiff looked either up or down the track to ascertain whether a train was approaching or not is found in answer to a single question by his counsel. The plaintiff was asked: "Did you look up and down the track when you were about to go on it?" The answer was: "Yes, sir." Then the question was asked plaintiff: "And why could you not see a train coming?" Answer: "Because there were cars on both sides, and the whistle did not blow." The plaintiff did not swear that he looked up and down the track after he got upon the track, but it must be drawn from his answer that he looked before he got upon the track, and he could not see the train approaching, because there were cars on both sides of him. Three witnesses, Bowman, Baca, and Sedillo, testified that they did not see any cars standing on the tracks. But, if there were cars standing at each side of him, so that he could not see a train coming, he should have looked and listened after going

upon the track and walking up the track, where his view would not have been obstructed by the cars. The plaintiff did not testify that he looked back after getting upon the track to see whether the train was coming or not, and the testimony certainly shows that he neither looked nor listened for the train after getting upon the track. The witnesses Bowman and Hatch testify that they came upon the track about seventy-five yards north of him, that he was coming toward them, and they saw the train behind him. Bowman motioned with his arms to attract his attention, but he seems to have been paying no attention whatever to their efforts to warn him until the train was almost upon him. The plaintiff's counsel insists strenuously that the whistle on the machine shops was blowing at the time the plaintiff was walking upon the track, and consequently he could not hear the rumbling of the train approaching him. If true, it would not relieve the plaintiff from the obligation to look and see whether the train was approaching or not. Had he looked, he certainly would have discovered a train approaching him, and thereby no injury would have been done; but he seems to have been guilty of gross neglect, in that he walked for a considerable distance without looking behind him at all. Some witnesses for plaintiff say that he was upon the track when they came upon it, and the train was two hundred yards behind him. Therefore, some time elapsed before the train was upon him. Some of the witnesses testify, also, that the whistle upon the machine shops was not blowing when they first saw the plaintiff walking upon the track. The witness Hatch says that when he and the witness Bowman came upon the track they heard the rumbling of the train, and yet they were seventy-five yards further from the train than was the plaintiff at the time. This clearly shows the testimony of Bowman to be the fact, when he says that the whistle upon

the machine shop was not blowing when he came upon the track, and the plaintiff was upon the track before he came upon it. The witness Baca also says the whistle on the machine shop did not begin to blow until the train was from fifteen to twenty yards from the plaintiff. The testimony shows that the plaintiff, had he been using his sense of hearing, could have heard the train approaching from behind. That he could have seen the train approaching him is undoubted; and the only conclusion to be drawn from such testimony is that he did not either look or listen, or that he recklessly remained on the track after knowing his danger. Either state of facts would prevent a recovery by the plaintiff in this case. The fact that the plaintiff was upon a railroad track at all was a notification of danger. A railroad track is always a dangerous place for a person to be, and they are presumed to know that it is so. Plaintiff was shown to have lived in the neighborhood of the place where the injury occurred for a number of years, and was thoroughly familiar with the situation; and the fact that trains and switch engines passed back and forth over these tracks at all hours of the day—which the testimony clearly shows; and the fact that the blowing of the whistle upon the machine shops was calculated to drown the noise of the whistle of the train or the ringing of the bell would not in any manner relieve the plaintiff from the necessity of the use of ordinary care at the time he was upon the track. He admits that it was so loud that it would drown the whistle or the ringing of the bell, and, therefore, he was chargeable with greater care and diligence to look for the approaching train, both behind and in front of him, and it was negligence on his part not to do so. The testimony also shows that the train was running at a very low rate of speed, and, therefore, there could be no negligence charged on that account; but it is insisted that the

whistle was not blown nor the bell rung, as required by the ordinance of the town of Albuquerque, which was admitted to have been in force at the time of the accident. The fact that the bell was not rung nor the whistle blown, however, even if true, would not warrant a recovery by the plaintiff in this case, as shown by the evidence and authorities above cited; and many other authorities may be cited in support of the same position. It is incumbent upon the plaintiff to prove his allegations, and to establish the negligence of the defendant, before he can recover under any circumstances; and the negligence complained of is the failure to ring the bell, and blow the whistle, and take the necessary steps to stop the train. Plaintiff himself testifies that the whistle was not blown, but he is not supported by any other witness in the case. The witness Bowman says he did not hear the whistle blown or the bell rung; the witness Hatch testified that he did not know whether the whistle was blown and the bell rung or not; the witness Baca testified to the same effect; and the witness Sedillo testified that he did not hear the alarms given, but later in his testimony admits that he had stated previously that he did hear the whistle blown and the bell rung. Therefore, the testimony for the plaintiff as to the failure to blow the whistle and ring the bell is very slight indeed. But on behalf of the defendant, the engineer testifies that the whistle was blown, and also that the bell was ringing for a long distance before the plaintiff was struck by the engine. The fireman testifies to the same effect, and that he himself rang the bell until the plaintiff was knocked from the track.

Now, what efforts were made to stop the train? The engineer testifies that he did not see the plaintiff upon the track at all; that a very short time before the train struck plaintiff the fireman called to him that there was a man on the track; and the engineer testi-

fies that "the first thing I did was to blow the whistle with my left hand, and grab the throttlevalve with the other, and apply the air. Question. What do you mean by applying the air? Answer. Setting the brakes and stopping the train." Consequently, the witnesses for the defense, being the only witnesses who were in a situation to testify as to what was done to stop the train, show by their testimony that the air brakes were applied immediately, and that it was impossible, as the engineer further testifies, to blow the whistle and apply the air brakes and reverse the engine at the same time, but that he did all that he could to stop the train before it reached the plaintiff after his presence was discovered. The engineer further says that the reason he could not see the plaintiff was that he was upon the opposite side of the engine, and that he did not see him at all until he was falling from the front of the engine. The engineer also testifies that he was looking out for a train coming from the other direction, which was due about that time. There is no proof that the engineer did see the plaintiff; and, if it is insisted by the plaintiff that the negligence of the defendant consisted in failing to see him in time to stop the train, it may be replied that the testimony shows that the plaintiff, in walking up the track, was sometimes along the side of the track, sometimes upon a switch near by, and sometimes walking on the main track. The witness Baca, who was a witness for the plaintiff, testified that "the old man crossed from the switch to the main track," upon which the train was coming, and had only proceeded a few steps upon the main track when he was struck by the engine. The witness Sedillo testified that he saw the old man cross the track to the west side, walk up along the side of the track some distance, and then go upon the middle of the track, where he was when he was struck. The law is well settled that the engineer, in case he discovered

the plaintiff upon the track, had a right to presume that the plaintiff, who was an adult, would use ordinary care, and thereby leave the track in time to prevent an injury; and especially is that true under the testimony in this case, when it was shown that the plaintiff was on and off the track at different times; and if the testimony of the witness Baca is true, and he is a witness for plaintiff, the plaintiff had been, as the engine approached near to him, walking upon a switch, and crossed over to the main track just before the train, so as to get but a few steps before the train struck him. If he was seen upon the switch, there was no danger of injury, and the engineer had no reason to believe that he would step to the main track just in front of the train, which he certainly did, without looking whether a train was approaching or not. Therefore, we see no room for the contention, under the evidence, that there was negligence on the part of the defendant's servants in that they failed to stop the train. The evidence certainly shows that ordinary diligence was used by them.

We have endeavored to present fully the testimony in this case, and apply the law applicable to it, that the assignments of error may be the more clearly understood. In the court below, after the evidence was all in, a motion was made on behalf of the defense that the court instruct the jury to find for the defendant, which instruction was given. This is one of the errors upon which the plaintiff relies for the reversal of this case, and states in argument, that the question before the court now is not that the plaintiff was entitled to recover even if the case had gone to the jury, but whether or not the court erred in instructing the jury to find for the defendant. Juries in this territory are the judges of the facts, and in all cases where there is a real conflict of evidence upon material issues in the case, where the material issues are disputed, and

VERDICT, when
court may direct.

the testimony of witnesses must be weighed and their credibility determined, the court certainly would not be authorized to withhold from the jury the determination of the facts in such cases; but where the facts as to material issues are practically undisputed, and are therefore established, the law is that in case the court is satisfied from the facts established that there is no right of recovery in the plaintiff, to the extent that the court would be compelled to set aside the verdict, the court may, without error, instruct the jury to find for the defendant. The former rule that all questions of fact must be submitted to the jury, if there is a "scintilla" of evidence, has been materially relaxed, and from the more recent cases a more liberal interpretation of the rule has obtained. In the case of *Railroad Co. v. Houston*, 95 U. S. 697, from which we have already above quoted, the court, upon the state of facts there presented, said: "Upon the facts disclosed by the undisputed evidence in the case, we can see no ground for a recovery by the plaintiff. Not even a plausible pretext for a verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant." In the case of *Schofield v. C. & S. P. Railroad Co.*, 114 U. S. 619, the court said: "It is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 110 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478;

Anderson County Commissioners v. Beall, 113 U. S. 227; Baylis v. Insurance Co., Id. 316. In Railroad Co. v. Jones, 95 U. S. 439, it was held that "the plaintiff was not entitled to recover. It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to instruct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse." In the case of D. L. & W. Railroad Co. v. Converse, 139 U. S. 469, which was a case in which it is stated by the court that there was some conflict in the evidence relating to certain matters, but certain facts were clearly established, the court says: "It is contended that the court erred in not submitting to the jury the issue as to the defendant's negligence. Undoubtedly, questions of negligence in actions like the present are ordinarily for the jury, under proper instructions as to the parts of the law by which they should be controlled. But it is well settled that the court may withdraw a case from that body, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, and is of such a conclusive character that the court, in the exercise of its judicial discretion, would be compelled to set aside the verdict returned in opposition to it." The judicial records of this country show that, while there have been many meritorious cases upon this subject presented to the courts, there have also been many cases without merit which have consumed the time of the courts and juries unnecessarily. It is obvious that the rule as now laid down is intended to place it within the power of the courts to terminate frivolous litigation whenever, as shown by the evidence, such case may be presented. As was said in the case of North Pennsylvania Railroad Company v. Commercial National Bank, 123 U. S. 727: "It would be an idle proceeding to submit the evidence

to the jury when they could justly find only in one way." The evidence in this case is practically undisputed. It is clearly established that the plaintiff was not crossing the track, but that he was walking along the track, and it is undisputed that the place where the plaintiff was struck by the engine was not at a public crossing where the plaintiff had a legal right to be. The evidence for the plaintiff alone shows that he was using the track for a public highway at a very dangerous place; that he did not exercise ordinary care and diligence, either by looking or listening for the approach of the train; and these facts are sufficient to constitute negligence under the decisions of our courts, such as would defeat a recovery by the plaintiff in this case. The only question upon which there is any conflict of the evidence at all, if there can be said to be any conflict, is upon the question whether the whistle was blown and the bell rung or not; but, admitting that they were not, it would not justify a recovery by the plaintiff. The evidence as to the blowing of the whistle and the ringing of the bell on the part of the plaintiff is of the most doubtful and uncertain character, and the only positive evidence as to whether the whistle was blown and the bell rung is given by the witnesses for the defendant. Therefore, as the evidence stood at the time the court was asked to instruct the jury, there could be no serious contention that a jury would be justifiable in inferring such negligence on the part of the defendant as would render the defendant liable in the case. So that, upon the whole case as shown by the testimony, a case was presented that the court was authorized to instruct the jury to find for the defendant. Such a case was presented that a jury would not have been justified, from any testimony in the case, in inferring negligence that would render the defendant liable. Negligence is a mixed question of law and fact, but in case the material facts are undisputed it may become a

question of law, and in such case the court may properly direct the verdict as the law requires. An examination of the authorities as to what constitutes contributory negligence will show that, where the plaintiff fails to use such ordinary care and diligence as that of looking and listening for the approach of a train, it is held to be negligence in law, and will defeat a recovery. The plaintiff was an old man, but there is nothing to show that either his sight or his hearing was defective. He was thoroughly familiar with the danger incident to his position on the track of the defendant. He was chargeable with knowing that upon this network of tracks in the defendant's yards trains were passing continually back and forth, day and night; and he is not excusable if, by his failure to exercise ordinary care and diligence, he was injured, although the defendant's agents may have also been guilty of some degree of negligence. A railroad company is not required under such circumstances to practically become the insurer of the party injured, but rather he must become his own insurer. Suppose this case had gone to the jury upon the testimony disclosed in this record, and the jury had found for the plaintiff; upon motion to set aside the verdict the court would have been compelled to sustain the motion for want of evidence to support the verdict. That being true, it was not only the prerogative of the court to terminate the litigation at the earliest period after the testimony was all in, but it was the manifest duty of the court to do so. It is better to terminate such a case before verdict than set it aside after verdict, where the court can not permit a verdict to stand. Hence we are of the opinion that the court below did not err in instructing the jury to find for the defendant.

The second assignment of error is that the court refused to allow the plaintiff to prove that in the year 1880, when the Atchison, Topeka & Santa Fe Railroad

was constructed, the track crossed an old public highway somewhere near the point where the plaintiff was injured, and did not provide a crossing.

PUBLIC highway:
railroad cross-
ing, liability for
failure to pro-
vide.

This can not avail the plaintiff in this case. He was not crossing the track, but was traveling along the track. If the railroad company failed to provide a crossing where the old road was, that would not justify the plaintiff in walking along the railroad track in a different direction. If there was a road there at all in 1880, it crossed the track from east to west, but the plaintiff in this case was traveling along the track from south to north. In any event it could not constitute negligence on the part of the defendant company at this time, eleven years later, that would excuse the plaintiff for negligence on his part. The evidence being immaterial, the court did not err in excluding such evidence. *D. L. & W. Railroad Company v. Converse*, 139 U. S. 476. Finding no error in the record, the judgment of the court below is affirmed.

O'BRIEN, C. J., and FREEMAN and SEEDS, JJ., concur. LEE, J., did not sit in this case.

[No. 479. August 21, 1891.]

JOHN D. W. VEEDER, APPELLANT, v. CALVIN
FISKE, APPELLEE.

REPLEVIN—JUDGMENT—ORDER OF RESTITUTION, AFFECTING RIGHTS OF STRANGER TO RECORD—REMEDY.—In an action of replevin for the recovery of certain personal property detained, where the judgment was regular on its face, and not set aside, an order for restitution duly followed the judgment, as a necessary incident; and if its execution injuriously affected a stranger to the record, his remedy was by an independent action, and not by a summary proceeding affecting the judgment.

APPEAL, from an order vacating an order for restitution, restoring to plaintiff certain property taken from him by the sheriff summarily, from the Fourth Judicial District Court, San Miguel County. Order vacating order for restitution, reversed.

JOHN D. W. VEEDER for himself.

When the writ of replevin was placed in the hands of the sheriff for service, he was bound, under the statute, to execute the same by delivering the goods and chattels mentioned in the declaration and writ of replevin, to the plaintiff. Sec. 1979, Comp. Laws, 1884.

The statute provides that the sheriff shall be responsible on his official bond on returning to the defendant, his agent or attorney, any property replevied under the writ. Secs. 1990, 1991, Comp. Laws, 1884.

After the service of the writ of replevin, the property replevied, whether in possession of the plaintiff under his bond, given at the commencement of the action, or in possession of the defendant, his agent or attorney, under his forthcoming bond, returned by the sheriff with his writ into court, remains until the termination of the suit, in the custody of the law, and no act subsequent to the service of the writ can divest the court of its jurisdiction and control over it in rendering a judgment. Wells on Replevin, sec. 476; Hunt v. Robinson, 11 Cal. 272, 267; Hagan v. Lucas, 10 Pet. U. S. 400.

The express purpose of a suit of replevin is to recover the possession of specific chattels, and when such chattels are found, the sheriff, under the statute, must so act in reference to them as to place them in the custody of the law, under the jurisdiction and control of the court, for the purpose of rendering a

judgment in accordance with the object and purpose of the action, and for the accomplishment of that purpose, to wit: the recovery of the possession of such chattels. Wells on Replevin, secs. 768-774; Nickerson v. Chatterton, 7 Cal. 568; Smith v. Coolbaugh, 19 Wis. 118; Thompson v. Seheid, 38 N. W. Rep. (Minn.) 801; Clark v. Warner, 32 Iowa, 219.

Where the defendant, by his plea, as in this case, admits that the plaintiff is entitled to the possession of all the property mentioned in the declaration and writ of replevin, and the return of the sheriff shows that certain of the property taken by him under the writ, has been delivered to someone, presumably an agent or attorney for the defendant, under a forthcoming bond, the only judgment the court can enter under such a state of the pleadings, and the return of the sheriff, is for a return of all such property thus situated. Wells on Replevin, sec. 777; Johnson v. Frazer, 18 Pac. Rep. (Idaho) 48.

The judgment thus entered is conclusive upon the parties to the suit, and gives the relief to which plaintiff is entitled. In this case it orders that the property taken from the plaintiff shall be returned to him, and that an order be issued, directed to the sheriff, to return the same. The order issued by the clerk of the court in this case upon the judgment is the order required and referred to in the judgment, to be issued in order to carry the judgment into effect. It issues as a matter of course upon the judgment, just as an execution issues upon a judgment for a specific sum of money. Archibeque v. Miera, 1 N. M. 419; sec. 2157, Comp. Laws, 1884.

W. J. MILLS for appellee.

STATEMENT.

This was an action to recover possession of certain chattels and personal property detained by the defend-

ant. A writ of replevin directed to the sheriff had been issued in behalf of the plaintiff. The sheriff executed the writ, and delivered the property to plaintiff, in whose hands it remained for four days. The sheriff then took from the possession of the plaintiff a portion of the property, viz.: one Mosler, Bomen & Company safe, the property in controversy, and delivered it to one C. L. Houghton. Plaintiff recovered a judgment, and an order was made for the return of the property to him. The clerk thereupon issued an order in the nature of a writ of restitution directed to the sheriff, requiring him to return the safe to the plaintiff. The sheriff, who was not a party to the action and had not intervened nor claimed any interest in the controversy prior to the judgment, moved for leave to show cause why he should be discharged from the order of restitution. Over the objection of plaintiff the sheriff was allowed to file affidavits to support his motion for a discharge, and the court, after considering the motion and affidavits, vacated the order for restitution of the property.

OPINION.

PER CURIAM.—The judgment below is regular on its face, and it was not opened or set aside. The order for restitution duly followed the judgment, being a necessary incident. If its execution injuriously affected a stranger to the record, he had an obvious remedy by an independent action, but no right to any summary proceedings affecting the judgment or its result. Therefore, the order vacating the order for restitution was by an inadvertence irregularly made, and must be reversed, and the cause remanded to the district court for further action not inconsistent with this opinion.

[No. 492. August 21, 1891.]

**BOARD OF EDUCATION OF EAST LAS VEGAS
ET AL., APPELLEES, V. JESUS L. TAFOYA,
TREASURER OF SAN MIGUEL COUNTY, APPELLANT.**

SCHOOL FUNDS—MANDAMUS TO COMPEL DISTRIBUTION—CONSTRUCTION OF STATUTES.—In a proceeding by mandamus, by the board of education of East Las Vegas, to compel the treasurer of San Miguel county to place to the credit of said board all moneys in his hands, and that might be received by him, derived from licenses for the sale of intoxicating liquors within said town, and to pay said moneys, when collected, to the treasurer of said board, where the question was whether said funds belonged to the general school fund, to be apportioned and distributed to all of the school districts of said county, or whether such funds were to be placed to the credit of and paid to the school district of said town, the appellees relying upon section 35, chapter 25, Acts, 1891, which was enacted and became a law February 12, 1891, and the appellant upon section 3, chapter 9, Acts, 1891, enacted February 2, 1891, but which did not take effect until May 1, 1891—Held: The former act, having been enacted subsequently to the latter act, must prevail as the latest expression of the legislature. The latter act having made no provision for the distribution of the fund, the presumption is the legislature then had in mind the passage of the former act, which provides that the license money shall be placed to the credit of the several school districts, and not to the general school fund of the county.

2. Chapter 77, which is amendatory of chapter 25, section 1, provides that the three mill tax shall be paid direct to the county treasurer instead of the territorial treasurer, as provided in chapter 25; and section 9 of chapter 77 provides for boards of education in incorporated cities and towns. The appellees are within the provisions of this act, and therefore entitled to the relief sought herein.

APPEAL, from a judgment for plaintiffs, from the Fourth Judicial District Court, San Miguel County.
Judgment affirmed.

The facts are stated in the opinion of the court.

E. L. BARTLETT, solicitor general, for appellant.

E. V. LONG for appellees.

McFIE, J.—This is a proceeding by mandamus, wherein the board of education of the town of East Las Vegas seeks to compel the treasurer of the county of San Miguel to place to the account or credit of said board all moneys now in his hands, or which may hereafter be received by him, derived from license for the sale of intoxicating liquors within said town, and that said moneys be paid, when collected, to Daniel Hoskins, treasurer of said board. Alternative writ having issued, all formalities were waived, and upon the hearing of the court below a peremptory writ was awarded, in accordance with the prayer of the petition. To reverse the judgment of the court below the cause was brought to this court by appeal. The sole ques-

SCHOOL funds:
mandamus:
construction of
statutes.

tion submitted to this court is whether the money derived from liquor licenses collected in the school district of East Las Vegas belonged to the general school fund, to be apportioned and distributed to all of the school districts of the county of San Miguel, as provided in section 13, chapter 25, Laws, 1891, as contended by the appellant, or whether such funds are upon their receipt to be placed to the credit of and paid to the school district of East Las Vegas, as provided in section 35, chapter 25, Laws, 1891. The appellant relies upon section 3, chapter 9, of the Laws of 1891, which is as follows: "Sec. 3. Every license herein provided for shall be issued for the period of twelve months by the clerk of the board of county commissioners, upon order of such board, or by the city or town clerk or recorder, upon order of the mayor, city, or town council or board of trustees, as the case may be, and shall by such clerk or recorder be turned over to the applicant for said license upon the payment of said license fee by said applicant into the hands of the county treasurer, to be covered

into the general school fund of the county; provided, that any officer who shall deliver to the applicant any such license until the tax thereon has been paid as herein provided shall forfeit to the said school fund double the amount of said license, to be recovered upon the official bond of said officer." The last clause of this section, it is insisted, provides that the license fund shall be paid to the county treasurer, to be covered into the general school fund of the county. Without examining into the merits of this contention for the present, we will first inquire as to the intention of the legislature in enacting chapter 9. It will be observed that chapter 9 is entitled, "An act licensing the sale of intoxicating liquors and regulating the same." The entire chapter is devoted to the subject of license, having no reference by title to school purposes. It provides a graduated system of license, ranging in amounts from \$100 to \$400, and erects the legal machinery necessary to carry the system into successful operation. The legislative mind was therefore, at the time of the passage of what is known as the "High License Law," absorbed in the perfection of the law licensing and regulating the sale of intoxicating liquors, aside from all other subjects. Section 3 is the only section of the entire act that refers to schools or school funds, and that section is couched in very general terms. In adopting the license system, a large fund would necessarily be derived from it, which fund must be devoted to some proper purpose, and must have a custodian. The legislature determines that this fund shall be devoted to school purposes, and, while the language used is that it is to be covered into the general school fund of the county, it still remains apparent that this language is used in a general sense, and substantially says that the license fund shall be devoted to school purposes. But a single section is used for this purpose, and that section is one

of accumulation and not of distribution. Under this section the license fund is placed in the hands of the county treasurer of the respective counties, without any provision whatever for its disbursement, and from this fact, and the further fact, of which we take judicial knowledge, that a few days later the same legislature passed an act for the disbursement of school funds, we have a right to presume that the legislature had in mind the subsequent act of distribution, and therefore remitted the whole subject of the distribution of the license and other school funds to the further action of the legislature.

This view we find fully sustained by an examination of chapter 25, Laws, 1891. Passing to the consideration of chapter 25, Laws, 1891, we find the appellees relying upon section 35 of that chapter. It is undoubted that the legislature intended, by enactment of chapter 25 of the Laws of 1891, to provide a comprehensive public school system for the territory, and to do this it was necessary to provide details for the successful operation of the system. It was necessary to provide for the necessary officers, for the necessary funds, and for the distribution of all available funds for the support of the system. An examination of chapter 25 discloses that all of these subjects were elaborated in a minute, intelligent, and creditable manner. The matter of provision for funds and of the distribution of them being alone before us in this case, we have examined these provisions with some care. Section 4 provides that the territorial board of education shall apportion the territorial school funds to the various counties, according to the number of children over five and under twenty-one years residing in the respective counties, and that the territorial treasurer shall draw his warrant in favor of the respective county treasurers for that amount appropriated to each county. This provision clearly refers to the territorial three

mill tax for school purposes, provided by law. After the fund passes to the county treasurer, section 13 provides for its apportionment to the different school districts of the county according to the number of children of school age in their respective districts. This fund, therefore, must be apportioned to all organized school districts in the county. Some importance is sought to be attached in the argument of the appellant to the words, "together with all the county school fund for the same purpose." Counsel for appellees contends that the poll tax provided for in section 36 is referred to, while counsel for appellant suggests that the license fund is meant. As to whether the poll tax constitutes that fund, or whether there is or is not any such fund in the county treasury, we are not called upon to decide in this proceeding; but we are satisfied that the license fund was not contemplated by that section of the act, nor was it intended to dispose of the license fund in that unrestricted manner. The license fund is clearly within the provisions of section 35, chapter 25, Laws, 1891, and is as follows: "Sec. 35. That the following are hereby declared to be and remain temporary funds for common school purposes: First. The proceeds of all sales of intestates' estates which escheat to the territory. Second. All forfeitures or recoveries on bonds of county, precinct, or territorial school officers. Third. The proceeds of all fines collected for violations of the penal laws. Fourth. The proceeds of the sales of lost goods or estrays. Fifth. All moneys arising from licenses imposed upon wholesale and retail liquor dealers, distilleries, breweries, wine presses, gambling tables, or games of chance, which now pay license, or may hereafter be required to pay license. All the moneys arising from the above enumerated sources, when collected, shall be paid into the county treasury to the account of the several school districts wherein such sums are collected, officers col-

lecting and paying in the same taking the county treasurer's receipt therefor. Should there be more than one school district in any precinct, said amount collected shall be divided among the several school districts pro rata, according to the scholastic census of said district as furnished to the county school superintendent for the current year." This section refers specifically to license fund, directs the manner of its distribution, and to whom it shall be credited. There was no provision for the distribution of this fund in the act creating it; therefore there can be no conflict between that act and section 35, which provides for a distribution of the fund. It is very evident that the legislature, in drafting section 35, had in mind the former act, because it refers to the specific fund thereby created, adopts the provision that the county treasurer shall be the custodian, and then specifically directs that the treasurer shall place the funds to the credit of the school districts from which the money is collected. While the phraseology of that part of the section is not the best that could have been used, still that is obviously the meaning of the language. Appellee insists that the word "account" in the latter part of section 35 is used in a special sense, and is not equivalent to the word "credit;" that the language of that section means simply that an account shall be taken of the money received from school districts; but we can not agree to that construction. It is refined, but not persuasive. The language, "shall be paid into the county treasury to the account of the several school districts wherein such sums are collected," clearly indicates that the legislature intended that the funds arising from licenses, fines, and other sources referred to in section 35, should inure to the benefit of schools in the districts wherein or by which the money is paid into the county treasury; that such money shall be placed to the account or credit of such district as soon

as paid into the county treasury, and thereby become available only to the district from which the money was received; that the word "account" as used by the legislature is equivalent to the word "credit." We find additional evidence in section 42. In that section fines are provided for, and as to the money collected from those fines section 42 says: "All fines so collected shall be paid into the county treasury, and placed to the credit of the school district in which the offense occurs." Section 35, in referring to fines as well as licenses, uses the same language as section 42, except the word "account" is used instead of the word "credit." It could not have been the intention of the legislature to place fines collected under section 42 to the credit of the district from which they come, and do otherwise with the fines collected under section 35. Further, we see no reason for taking an account of funds derived from licenses collected in the different school districts, unless it be for the purpose of giving such districts the benefit of such funds, and we can not believe that the legislature required a meaningless thing to be done.

It is further contended by the counsel for appellant that although chapter 9 was enacted prior to chapter 25, it did not take effect until May 1, 1891, while chapter 25 became a law February 12, 1891. There is no conflict between these acts, and both may remain in full force and effect. If, however, there was a conflict between section 3, chapter 9, and section 35, chapter 25, section 3 would be repealed to the extent of the conflict—First, because it is general, whereas section 35 is specific; and, second, because section 35 is the latest expression of the legislative will upon the subject. Counsel for appellant cite authorities to the effect that where a law is passed to take effect in futuro it became operative upon the day when it takes effect. Such is the law, but it is not the law applicable to this

case. In case the last act passed by the legislature upon a given subject takes effect in the future, while a former act upon the same subject takes effect upon its passage, the provisions for the former act will prevail until the taking effect of the last act, because the latter act is the latest expression of the legislature; but if the former act takes effect last it will not prevail over a later expression of the legislative will. The reason is obvious. The last expression of the legislative will must prevail. If a mistake has been made in a former act, even during the same session, they have the power, and it is the duty, of the legislature to correct it. If for any reason the legislature desire to change a former law, they have the power to do so by a subsequent act; but, if the contention of the appellant is sustained, the last expression of the legislative will would be defeated by a former expression, which would be contrary both to reason and the law. The high license law did not take effect until May 1, 1891, while the public school law took effect upon its passage and approval, February 12, 1891. Appellant admits that the high license law was passed by the legislature February 2, 1891, ten days prior to the passage of the school law, but contends that, as it did not take effect until May 1, it became after that date the latter and controlling law. We can not give our assent to this view, as in effect it would prevent a legislature from correcting its errors or mistakes, and all that would be necessary to prevent a legislature from correcting vicious legislation would be to secure the postponement of the taking effect of the obnoxious act until after the adjournment of the session of the legislature. It is very evident that the legislature, in providing that the high license law should take effect May 1, was simply to fix a time when the new license system should commence, and give a reasonable time for preparation for compliance with its terms. Chapter 77, Laws, 1891, is amendatory

of chapter 25, section 1, and provides that the three mill tax shall be paid direct to the county treasury, instead of to the territorial treasurer, as provided in chapter 25. Section 9, chapter 77, provides for boards of education in incorporated cities and towns. The appellees are within the provisions of this act, and entitled to the relief sought in this proceeding. The court below properly granted the peremptory writ of mandamus, and the judgment of the court below is affirmed.

LEE, FREEMAN, and SEEDS, JJ., concur.

[No. 434. January 6, 1892.]

AUGUST KIRCHNER, APPELLEE, v. SARON N.
LAUGHLIN, APPELLANT.

CONTRACT—SUIT FOR BREACH—BEST EVIDENCE.—In a suit for breach of a verbal contract alleged to have been made by defendant in discharge of an alleged written contract not purporting on its face to have been signed by defendant personally, but to have been made by another for defendant as his agent, where defendant pleaded the general issue, and, by special plea, denying under oath the execution of the alleged written contract, or that he had authorized any person to execute it for him, it was error to permit a witness in behalf of plaintiff to testify, over the objection of defendant, as to the contents of a letter, purporting to authorize such other person to execute such alleged written contract in his own behalf and that of defendant, on a mere showing that the person in whose possession the letter was, was beyond the jurisdiction of the court, where it was not shown that the letter had been lost or destroyed, or that any effort had been made to produce it. The objection was sufficiently specific to apprise the court that the letter itself was the best evidence of its contents, and that secondary evidence thereof was inadmissible.

ID.—CROSS-EXAMINATION—EVIDENCE.—In such case, where the witness in behalf of plaintiff testified that defendant wrote to him several letters, in which defendant expressed the wish to have his name stricken from the contract, the court below erred in not permitting the witness to be cross-examined as to the reason given in the letters, if any, for such wish.

ID.—IMPEACHMENT OF WITNESS—EVIDENCE.—Where it is desired to contradict a witness by letters written by him, before they can be admitted in evidence, a proper foundation must be laid for their admission, by calling the witness' attention to those parts of them which are to be used for that purpose, under section 2084, Compiled Laws, 1884.

ID.—RATIFICATION OF AGENT'S ACTS—INSTRUCTIONS—EVIDENCE.—Where the defendant testified that he knew of the alleged contract, but did not know that his name had been signed to it, an instruction that if the jury found that defendant had knowledge of such contract, and of plaintiff's performance of his part of it, and acquiesced in such contract, and in the conduct of his alleged agent thereunder, "he ratified the same, and is bound thereby, even if there was lack of authority to its original execution," was misleading and erroneous.

APPEAL, from a judgment in favor of plaintiff, from the First Judicial District Court, Santa Fe County. Judgment reversed.

The facts are stated in the opinion of the court.

H. C. WALDO, C. H. GILDERSLEEVE, and GEO. C. PRESTON for appellant.

CATRON, THORNTON & CLANCY and W. B. SLOAN for appellee.

JOHN H. KNAEBEL of counsel.

O'BRIEN, C. J.—On the ninth day of August, 1879, the plaintiff, August Kirchner, a resident of Santa Fe county, in this territory, claims to have entered into a written contract with the defendant, Saron N. Laughlin, a resident of California, and one Joseph H. Wiley, of the tenor following, to wit:

"These presents witness that, whereas, August Kirchner agrees to intrust and deliver to Joseph H. Wiley, of Santa Fe county, New Mexico, and Saron N. Laughlin, of California, two thousand ewes, upon the terms hereinafter stated, the said Joseph H. Wiley and Saron N. Laughlin agree and undertake to receive and hold and take care of the said ewes and to pay and

deliver to the said August Kirchner annually, for the use of the same, twenty-five good yearling wethers, to be delivered at such point in said county of Santa Fe as the said Kirchner shall designate, wethers to be one year old, and twenty-five fleeces of good, clean wool to be delivered at such point on the railroad within the territory of New Mexico as said Kirchner shall designate, for each one hundred of said ewes; that is to say, five hundred wethers and five hundred fleeces of wool annually for the two thousand ewes. The said ewes to be from one to four years old, and to be delivered and received during the month of August, 1879, and this contract to continue and be in force for the term of five years from the date thereof, and at the end of said term of five years the said Joseph H. Wiley and Saron N. Laughlin are to and hereby undertake to deliver to said August Kirchner two thousand ewes of like ages, quality, and condition as those which shall be delivered to them: provided, that they may deduct therefrom any number of ewes which may be lost by inevitable accident or act of God. It is further agreed that said ewes shall be regarded as the property of said August Kirchner, and that if the said Wiley or the said Laughlin shall at any time attempt to remove the same from the territory, or to dispose of the same, without the consent of the said August Kirchner, the said August Kirchner may take possession of the same as his property, by replevin or otherwise, either the same ewes or others which may be substituted for them; the true intent and meaning hereof being that the said Wiley and Laughlin are at all times to keep and hold and have on hand two thousand ewes, to be held and regarded as the property of said August Kirchner. It is further agreed that said Joseph H. Wiley and Saron N. Laughlin shall pay all taxes which may be assessed upon said sheep, or to which the same may be liable, and shall answer for all trespasses committed

and damages caused by them. In testimony whereof,
etc.

JOSEPH H. WILEY. [SEAL]

“SARON N. LAUGHLIN. [SEAL]

“Witness: M. A. BREEDEN.

“By JOSEPH H. WILEY, his Agent.

“It is hereby acknowledged that the sheep mentioned in the foregoing agreement were received by the undersigned as therein provided, and at the same time five hundred ewes additional, of like quality, character, and description, and upon the same terms and conditions as above specified, and also twenty-three good, sound, serviceable rams, which number of rams are to be delivered with the sheep on the execution of said contract.

SARON N. LAUGHLIN.

“By J. H. WILEY.

“J. H. WILEY.

“Santa Fe, Sept. 14, 1881.”

The relations existing between Laughlin and Wiley at the time the foregoing contract was made are disclosed by the following written instrument:

“This agreement, made this sixth day of December, A. D. 1875, between S. N. Laughlin, of Castroville, Monterey county, and state of California, party of the first part, and J. H. Wiley, of Natividad, Monterey county, and state of California, party of the second part, witnesseth, that the party of the first part agrees to lease to the party of the second part the surveyed portion of the Eaton Grant, situated in Santa Fe county, and territory of New Mexico, for a period of one year from January 1, 1876, or to January 1, 1877, and to allow said second party thirty dollars (\$30.00) per month for said one year; also, one tenth increase of stock raised upon said grant, providing said first party sees fit to place any stock upon it; also, one half of net proceeds of hay, from said grant, and two thirds of all grain, vegetables, or whatever else may be raised upon said grant by said second party individually, and one

tenth of one third of whatever may be raised on shares by others. Also, to furnish said second party with one thousand dollars in money as he may require it for the purchase of horses or mules and farming implements. Said advance to draw one and one half per cent interest per month. Also, to furnish whatever seed may be required for planting, and furthermore to allow said second party to work as much of the irrigable land of said grant, for a second year, as he may choose, on same conditions as heretofore expressed, except that he shall not receive a salary from said first party. The party of the second part, for the consideration above mentioned, agrees to superintend the aforesaid grant, to take good care of the orchard and house and live stock placed upon said grant by said first party, and to use his exertions in endeavoring to promote the interests and welfare of said first party. He agrees to cultivate land himself, to let land on shares, and to take good care of the stock and implements purchased by himself, and not to remove or dispose of any of same until all advances made by said first party shall have been fully satisfied. He further agrees to cut and market the hay, and, after deducting the necessary expenses for so doing, to turn over to said first party, or his order, one half of the net proceeds, and to market at Santa Fe said first party's interest in all else raised upon said grant, being one third of what is raised by said second party, and three tenths of what is raised by others, and to turn over the proceeds to said first party or his order. Said second party also agrees to retain said Eaton Grant on same conditions as heretofore expressed in this agreement, for a period of three years, if said first party so elect. In witness whereof, etc.

S. N. LAUGHLIN.

[SEAL]

"J. H. WILEY."

[SEAL]

Wiley was in possession of the grant under the foregoing "lease" at the time of the execution of the

alleged contract between Kirchner, Laughlin, and himself. The plaintiff in his declaration states that on the ninth day of August, 1883, the alleged contract was, by the mutual consent of the parties thereto, terminated, and in full satisfaction and discharge of all obligations assumed thereby the defendant agreed to deliver to the plaintiff two thousand, five hundred ewes and twenty-three rams, six hundred and twenty-five wethers, and six hundred and twenty-five fleeces of wool; that defendant, in violation of such verbal agreement, failed and refused to deliver any more than one thousand, two hundred ewes and twelve rams,—to plaintiff's damage \$3,000. The defendant pleaded the general issue to the declaration, and pleaded specially "that the said supposed agreement in writing is not his deed, and he denies his signature thereto; that he never executed the said instrument, nor authorized any person to execute it for him." Upon the issues so made the case was tried to a jury, WHITEMAN, J., presiding, resulting in a verdict in favor of plaintiff for \$3,910. The defendant thereupon moved for a new trial on the fifteen alleged grounds of error, which motion was overruled, and judgment entered on the verdict. The cause is here for review on defendant's appeal from this judgment.

It is not disputed that unless appellant, Laughlin, executed, authorized, or subsequently ratified the execution of the alleged written contract, there would be no consideration to sustain his alleged verbal promise as to the delivery of a certain number of sheep and a quantity of wool, claimed to be made by him in 1883, in full satisfaction of all his obligations under such contract. The defendant, in his special plea, expressly denied under oath the execution of that instrument. In the absence of proof of such execution, by competent evidence, plain-

CONTRACT: suit
for breach: best
evidence.

tiff would not be entitled to recover. The contract does not purport to have been signed by the defendant personally. His signature thereto is the act of Wiley, as his agent. Hence, as this written agreement is the foundation of plaintiff's right of action, we must first determine whether Wiley's agency was properly established on the trial or not. No formal power of attorney had been given, and it is not pretended that the "lease" between Laughlin and Wiley, set out in the foregoing statement, authorized the latter to execute such contract in behalf of the lessor. The so-called original contract purports to have been made on August 9, 1879, and the supplement thereto on September 14, 1881. The trial took place on the twenty-sixth, twenty-seventh, and twenty-eighth days of August, 1890. Wiley at that time resided in California. His testimony on the question of his disputed agency, the letters or other written instruments presumably in his possession, or under his control, evidencing his right to attach appellant's name to the contract, would have been important, if not decisive, on the trial in the court below. Yet no effort appears to have been made to secure his attendance, to procure the written evidence of his alleged agency, or to take his deposition. It is true he was beyond the jurisdiction of the court, and was not amenable to its process or orders. Still, three letters addressed to him by appellant were found among the files in the cause. Why or how they were there, and why the fourth one, claimed by plaintiff to contain the evidence of his agency, was neither filed nor produced, does not appear in the record. This brings us to the consideration of the first error assigned by the defendant to secure a reversal of the judgment. In that assignment he claims that the district court erred in allowing a witness in behalf of the plaintiff to testify as to the contents of a letter, written by Laughlin, shown to him by Wiley on August 9, 1879, purporting to

authorize Wiley to execute the contract in his own behalf and that of the appellant. This was the only material testimony offered or received in support of Wiley's agency. Defendant objected to its admissibility on various grounds,—among others, that it was incompetent. Plaintiff now contends that the objection was too general to be available. We do not see any reason in the record why the objection should be more specific. Plaintiff contended that the agency in dispute was fully authorized by a certain letter claimed to have been written by Laughlin to Wiley. It had not been shown that the letter had been lost or destroyed; that any search or effort had been made to procure it. It was shown, it is true, that Wiley, to whom the letter had been addressed, and in whose possession it had been last seen by the witness, resided in California.

Notwithstanding the fact of nonresidence, we are clearly of the opinion that the objection was sufficiently specific to apprise the court that the letter itself was the best evidence of its contents, and that secondary evidence thereof could not be received on the mere showing of Wiley's nonresidence. Without the testimony of the witness Breeden as to the contents of this letter, there was no evidence to sustain the verdict. This testimony could not be received over the objection of the defendant without having previously shown some effort to procure it, or to account for its nonproduction. No such effort was shown. The authorities cited by appellee in support of his contention to the contrary do not sustain his position. The rules of evidence on this point may have fluctuated prior to the introduction of the statutory mode of taking the testimony of nonresident witnesses by deposition; but it is very clear that since the adoption of that system the rule has been invariable, as far as we can discover, that secondary evidence of the contents of a written instrument, constituting the foundation of the cause of action

or defense, is not admissible, in the absence of statutory sanction, merely because such instrument is in the possession of a party residing outside of the court's jurisdiction.

We have examined the authorities cited in the brief of the learned counsel of the appellee apparently in conflict with the foregoing views (*Barton v. Driggs*, 20 Wall. 134; *Shepard v. Giddings*, 22 Conn. 282; *Brown v. Wool*, 19 Mo. 475; *Teall v. Van Wyck*, 10 Barb. 376; *Boone v. Van Dyke*, 3 Mass. 352; *Eaton v. Campbell*, 7 Pick. 10; *Bailey v. Johnson*, 9 Cow. 115; *Mauri v. Heffernan*, 13 Johns. 58), but are unable to find in any of them the approval of a different rule. The appellee relies upon a contract in writing for his right to recover in this action. The defendant in his pleas denies that he ever made such contract. Not one of these cases goes so far as to hold that, if the evidence of the execution of the contract is to be found in a writing in the possession of a person residing beyond the jurisdiction of the court, the contents of such writing may be shown by parol, in the absence of proof that proper efforts had been made to produce it. The supreme court of the United States, notwithstanding the doctrine enunciated in *Barton v. Driggs*, 20 Wall. 134, apparently favoring the contention of appellee, has approved the rule. "If the paper," says that court in *Turner v. Yates*, 16 How. 14, "was in the hands of the consignees in London, secondary evidence was not admissible. If as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it." In a well considered case recently decided by the supreme court of the state of Oregon (*Wiseman v. N. P. R'y Co.*, 26 Pac. Rep. 272), it is held that "the fact that the person to whose possession the paper was traced resided out of the state did not excuse the defendant from a diligent effort to pro-

cure it.” To the same point: *Dickinson v. Breeden*, 25 Ill. 186; *McGregor v. Montgomery*, 4 Pa. St. 237; *Whart. Ev.*, sec. 130; *Wood v. Cullen*, 13 Minn. (Gil.) 394; 5 Day (Conn.), 286. We consider this the only safe rule, and any departure from it would only add to the number of uncertainties incident to judicial investigations. Besides, it is supported by an almost unvarying current of decisions of the courts of the greatest respectability. Had we any discretion in the matter, we would feel constrained, in view of the peculiar circumstances of this case, to exercise it in the behalf of the defendant. Without proof of the written contract,—modified, it is true, but not entirely superseded, by oral agreement, subsequent to its execution,—this action can not be sustained. *White v. Soto*, 82 Cal. 654. This contract purports to have been signed by Wiley as the agent of the defendant. The right so to sign it was expressly denied by the principal. Hence it was necessary to prove on the trial the agent’s express or implied authority. The power to sign, plaintiff contended, was to be found in a letter written in August, 1879, by the appellant to Wiley. At that time Wiley showed the letter to the witness, Col. Breeden, then a lawyer in full practice in the territory. The letter, it appears, was then returned to Wiley, who at the time of the trial, in 1890, resided in the state of California. There was no effort made to procure the letter, to take the deposition of Wiley, or even to request his attendance at the trial. In the face of these facts, over the objection of the defendant, Breeden is permitted to prove the contents of the letter, forming the very basis of plaintiff’s cause of action. Eleven years had elapsed since he had read the letter, and the result of the suit is made dependent upon his version of its contents. His memory may have been more felicitous than was that of the “Leader of the Ten Thousand.” Still, we do not feel at liberty to relax a rule, approved by every

consideration of public policy, to let in such evidence of the contents of an instrument that might have been produced, so far as the record shows, without great delay, expense, or inconvenience.

The second error assigned by appellant is based on the refusal of the trial court to allow the witness Breen to be cross-examined as to the reasons, CROSS-EXAMINATION: evidence. if any, given in certain letters written by defendant to witness, as to why he desired to have his name stricken from the contract. The witness was asked and answered as follows: "Direct examination: Question. Colonel, after the execution of this contract, did you have any communication with the defendant on the subject? Answer. I at once wrote what had been done. Q. Did he answer what you wrote? A. I am not able to remember, but I think there was no further correspondence on that subject for two years more. Then, after having come here, he wrote me several letters urging me to have his name taken off that contract, and have him relieved from any responsibility. That was several years after the transaction." "Cross-examination: Q. Did he state on what ground he wanted it taken off?" Plaintiff objected to this question as improper cross-examination, and the objection was sustained. We are clearly of the opinion that there was error in so ruling. The answer of the witness showed that the defendant then knew that his name had been signed to the contract. Why did he want it taken off? Either because he wished to relieve himself from liability thereunder, or because he had never signed nor authorized the signing thereof. Plainly, the jury were entitled to the information sought by the question, whether material or only collateral to the issue. The importance of this question is rendered more apparent by the record of the second trial of the action. The "agent" Wiley was then a witness, and Col. Breeden was not. The judgment was against the

defendant, and he appealed. In the decision of that case (23 Pac. Rep. 175), the court say: "Wiley testified that Laughlin was never in any way interested in the contract, and never gave me at any time permission or authority to sign his name to the Kirchner sheep contract, or to enter into any contract for him with Mr. Kirchner in regard to sheep, and Mr. Laughlin never at any time or place ratified the contract with Kirchner sued on in this cause."

The foregoing views are sufficiently comprehensive to dispose of the first six assignments of error.

The seventh assignment has peculiar significance in the light of the fact that authority to bind the defendant by this contract is positively denied by him on the present trial, and was as positively denied by him and Wiley on the former trial. Such authority is based solely upon the testimony of the witness Breeden. On July 10, 1882, and on June 20, 1883, Breeden wrote to Laughlin two letters, wherein he in substance stated that his opinion as to Wiley's right to sign the sheep contract in Laughlin's name was based upon representations made to him by Wiley. While Mr. Laughlin was on the witness stand, his counsel offered these two letters for the purpose of contradicting the testimony of Col. Breeden. Plaintiff's counsel objected on the ground that they were inadmissible for the purpose, for the reason that the proper foundation had not been laid to warrant their reception under provisions of section 2084, Compiled Laws, 1884. The objection was sustained. The ruling was correct. The section above cited provides: "But, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him." The rule would be the same in the absence of the statute, as declared by the English judges to the

house of lords in 1820, pending proceedings against Queen Caroline. 2 Brod. & B. 286–291.

There was also an exception taken to instruction number 10, given at request of plaintiff, assigned as appellant's ninth ground of error. The instruction is as follows: "If you find from the evidence that the defendant, Laughlin, had knowledge of the said contract, and the delivery to Wiley of the sheep thereunder, and therefore acquiesced in such contract, and the conduct of Wiley thereunder, he ratified the same, and is bound thereby, even if there was lack of authority to its original execution." The instruction is misleading and erroneous. Laughlin had testified that he knew of the existence of the sheep contract, but did not know that his name had been signed to it. In justice to the defendant the court should have inserted after the word "contract" the following: "And knew the contents thereof, and knew that his name had been signed to it."

All other errors assigned are covered by the views hereinbefore expressed. As this is the third time that this cause has been here for review on the appeal of the defendant, it is to be regretted that we can not allow the judgment to stand. Admitting, as claimed in the able brief of the very learned counsel for appellee, that it is the interest of the public that there should be a speedy termination of lawsuits, there is another principle of public policy, of paramount importance that our duty prohibits us from ignoring, and that is that no one ought to be deprived of his property except in accordance with the law of the land. The judgment below is reversed.

FREEMAN, MCFIE, LEE, and SEEDS, JJ., concur.

[No. 465. January 6, 1892.]

HENRY GRANT, PLAINTIFF IN ERROR, v. PEDRO Y. JARAMILLO, DEFENDANT IN ERROR.

PUBLIC LANDS—PATENT—SPANISH GRANT—EJECTMENT—LIMITATION—PRESCRIPTION.—In an action of ejectment for the recovery of land in New Mexico, claimed under a patent from the United States, held by defendant under claim of grant to his grantors from the king of Spain, while New Mexico was a province of Spain, and by virtue of an actual uninterrupted possession and cultivation of the land by him and his grantors continuously since 1825, and that if there never was such a grant, then his grantors had title by prescription, by long continued possession and cultivation under the Spanish and Mexican laws, recognized by the treaty of cession, where the defendant offered no title papers in support of his claim,—Held: If the defendant had any rights growing out of the claims set up by him to the land in controversy, they were of an inchoate nature, and, as has been held by the supreme court of the United States, such as have been reserved by congress to be determined by the political department of the government, or by such tribunal as may, by act of congress, be authorized to determine them; and this court has not been vested with such authority.

ERROR, from a judgment for plaintiff, to the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

N. B. LAUGHLIN and **C. H. GILDERSLEEVE** for plaintiff in error.

F. W. CLANCY for defendant in error.

LEE, J.—This is an action in ejectment by defendant in error brought in the district court for Rio Arriba county, and on change of venue tried in Santa Fe county, for the possession of a tract of land described in the declaration. To the declaration the defendant below, plaintiff in error here, pleads not guilty, the

statute of limitations, and notice as required under section 2270, Compiled Laws, 1884. Issue was joined and trial had at the February, 1890, term, and verdict for the defendant in the court below, and the verdict was set aside by the court, and new trial granted, and tried again at February, 1891, term, at which trial the court directed a verdict, as to the possession, for the plaintiff, and the jury returned a verdict for the plaintiff as to the improvements, and the case is here on a writ of error from the judgment of the court below on that verdict. The defendant in error claims title to the land under a United States patent issued to him on an entry made under the public land laws of the United States by him in the year 1883. The plaintiff in error claims that the title to the land in question is in him, because—First, the land is a part of a grant of land made by the king of Spain in the early part of this century to one Joaquin Garcia, at and comprising the town of El Rito, in Rio Arriba county; second, by virtue of the original deeds and mesne conveyances from his grantors running back to the year 1825; third, by virtue of actual and uninterrupted possession and cultivation of the land by him and his grantors continuously since the year 1825 to the commencement of this suit; fourth, that if the grant was made to Joaquin Garcia, but has since been lost or destroyed, then his grantors had a title under the Mexican government, such as should be recognized by the laws of this country under the treaty of Guadalupe Hidalgo, and the land was reserved from sale and the patent was issued without authority of law, and is void; fifth, that, if there never was a grant made to Joaquin Garcia by the kingdom of Spain or Mexico, his grantors, by virtue of their occupation and cultivation, had title under decrees of Mexico made to them confirming the lands to occupiers and cultivators of the crown lands or public domain; sixth, his grantors had

title by prescription, by long-continued possession, and cultivation under the Spanish and Mexican laws, such as should be recognized under the stipulations in the treaty of Guadalupe Hidalgo.

In this case it is claimed by the plaintiff in error that the title to the land in question is in him, because it is a part of a grant of land made by the king of Spain in the early part of the present century to one Joaquin Garcia; and that by transfers, either in writing or verbal, the title passed down from said grantee to the defendant in the suit below; and that, if there never was a grant made to Joaquin Garcia, the said defendant holds the same by prescriptive rights under the Spanish and Mexican laws, such as should be recognized under the stipulation in the treaty of Guadalupe Hidalgo. Counsel for appellant cite a number of authorities to the effect that under the laws of Mexico transfers of real estate could be made by verbal contract. This proposition has never been controverted by this court. The statute of frauds was unknown to the civil laws which were in force in Mexico at the time of the acquisition of the territory, and real estate could be sold and delivered in the same manner as personal property. In the case of *Salazar v. Longwill*, 5 N. M. 548, there was no pretension of the delivery of the property under the sale. Whatever rights the grantees derived in that case were from the pretended deeds offered in evidence, and it is very clear they purported to be transfers before a notary public by what would be termed a "public writing" (*escritura publica*), and governed by the laws as referred to in that case. The rulings, however, in that case have no application to the one now under consideration. In this case the plaintiff in the court below brings his suit in ejectment, claiming title to and the right of possession of the property in question by virtue of a patent of the United

SPANISH

grant: eject-
ment: limitation:
prescription.

States issued to him by homestead entry under the general land laws; the plaintiff in error claiming that the patent was void, for the reason that the land was not subject to entry from the United States, because it was embraced in a grant from the king of Spain to one Joaquin Garcia while this territory was a part of a province of that kingdom. There were no title papers offered in evidence showing the existence of such a grant, but the court was asked to presume such a grant from the occupation of the land since the year A. D. 1825; or, if such presumption could not be exercised, that the court should hold that the plaintiff in error was entitled to the land by virtue of the prescriptive laws of Mexico, which, it is claimed, should be recognized by the court as a part of the law of this country, under the stipulation of the treaty of Guadalupe Hidalgo. The proposition of the plaintiff in error thus taken is clearly set forth in an instruction which he asked the court to give to the jury, to the refusal of which he excepted, thus bringing the question directly to be passed upon by this court.

The instruction is as follows: "If the jury shall find from the evidence that about the year 1825, and prior to the time when the country comprising the territory of New Mexico was ceded by the republic of Mexico to the United States, the land in controversy in this action was held, possessed, and occupied under a claim of ownership by any person or persons, and such lands were by such person or persons improved or cultivated under such claim, and such possession and claim were public, open, and notorious, and this condition continued until the cession of this territory to the United States in 1848, you will be justified from this state of facts, if found by you to exist, in presuming that the person or persons so holding, possessing, occupying, improving, and cultivating such lands, prior to such cession held a grant or cession of such

lands from the governments of Spain and Mexico; and if you find that there was such a grant or cession, and if you further find from the evidence that the defendant in this cause, prior to the commencement of this action, acquired all the right, claim, title, and interest in the parcel of land in controversy that was had, held, and possessed by the person or persons owning the same at the time of the cession of this territory to the United States, then your verdict should be for the defendant."

The questions involved in this case have been fully investigated by the supreme court of the United States in numerous cases, and there is nothing left for us to do but to apply their rulings to the questions involved. In the case of *Dent v. Emmeger*, 14 Wall. 308, in regard to the claim of Gabriel Cerre by a concession made A. D. 1789 by the then lieutenant governor of Upper Louisiana, the court says: "Titles which were perfect before the cession of the territory to the United States continued so afterward, and were in nowise affected by the change of sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect preexisting rights of private property. Perfect titles are as valid under the new government as they were under its predecessor. But inchoate rights, such as those of Cerre, were of imperfect obligation, and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by congress, they became American titles, and took their legal validity wholly from the act of confirmation, and not from any French or Spanish ele-

ment which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims, or the circumstances attending it."

In order to more clearly understand the meaning of the word "inchoate," as used in the above opinion, it may be well to refer to the opinion in the case of *Burgess v. Gray et al.*, 16 How. 48. That case involved the same question raised in this case. John Jarrott in 1780, by permission of the officers of the Spanish government, settled on a tract of land in what is now Jefferson county, in the state of Missouri. That he, his heirs and assigns, continued to occupy and cultivate it until the year 1847, when the land was entered at the register's office by different persons under preemption allowed to them by the officers of the land office. Suit was brought in the circuit court of Jefferson county, Missouri, in which the plaintiff, by petition, set forth the claim and occupation of the said Jarrott and his heirs, with deeds of conveyance from the same in succession to the plaintiff; the defendants being the holders of the aforesaid entry titles from the government. The defendants demurred to the petition, which demurrer was sustained, and, on appeal from the judgment, was affirmed by the supreme court of that state (15 Mo. 220) and the plaintiff below appealed to the supreme court of the United States. Under the code, in Missouri, all claims, either in law or equity, set forth in the petition, could be determined in the action; and the federal supreme court, in passing on the question, said: "The demurrer admits the truth of the facts stated in the petition; and consequently, if these facts show that he had any legal or equitable right to the land in question under the treaty with

France, or an act of congress, which the state court was authorized and bound to protect and enforce, he is entitled to maintain this writ of error, and the judgment of the state court must be reversed. Now, as regards any equitable and inchoate title which the petitioner may possess under the treaty with France, it is quite clear that the state court had no jurisdiction over it; for it has been repeatedly held by this court that, under that treaty, no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by an act of congress. * * * The court had no jurisdiction upon the question; and the judgment of the state court can not be reversed unless the plaintiff can show that he had a complete and perfect title derived from the Spanish or French authorities, or a legal or equitable title under the laws of the United States. * * * Neither can the petition be maintained upon the long and continued possession held by the petitioner, and those under whom he claims. The legal title to this land, under the treaty with France, was in the United States. The defendants are in possession, claiming title from the United States, and with evidence of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he presents in his petition, has no title of any description, derived from the constituted authorities of the United States, of which any court of justice can take cognizance; and the mere possession of public lands, without title, will not enable the party to maintain a suit against anyone who enters on it; and more especially he can not maintain it against persons holding possession under the title derived from the proper officers of the government. He must first show a right in himself before he can call into question the validity

of theirs. Whatever equity, therefore, the plaintiff may be supposed to have, it is for the consideration and decision of congress, and not for the courts. If he has suffered injury from the mistake or omission of the public officer, or from his own ignorance of the law, the power to repair it rests with the political department of the government, and not the judicial. It is expressly reserved to the former by the act of congress." Certainly no such jurisdiction has been given to the district courts of this territory, especially in view of the fact that congress has made very ample provisions by creating a court with the exclusive jurisdiction to try and determine the validity of such claims. But, even in cases where the court has the jurisdiction, claims like that set up by the plaintiff in error could not be maintained against a person holding a patent from the United States in a proceeding of ejectment.

In *Steel v. Smelting Co.*, 106 U. S. 447, the court says: "Until set aside or enjoined, it must, of course, stand against a collateral attack with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent was out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation. It can not be vacated or limited in its proceedings where it comes collaterally in question. It can not be vacated or limited by the officers themselves; their power over the land is ended with the patent issued and placed on the records of the department.

This can be accomplished by regular judicial proceedings, taken in the name of the government for that special purpose. It does not follow that the officers of the government would take such proceedings even if the charges of fraud and the use of false testimony in obtaining the patent were true. They might be satisfied that the patentee was entitled to the patent upon other testimony, or that further proceedings would result in a similar conclusion, and that, therefore, it would be unwise to reopen the matter. In any event, whether the officers of the government have been misled by the testimony produced before them or not, the conclusions reached by them are not to be submitted for consideration to every jury before which the patent may be offered in evidence on the trial of an action. As we said in the case of *Smelting Co. v. Kemp*, "it is this unassailable character (of the patent) which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department, and the correctness of its ruling upon matters submitted to it, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereunto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

In regard to the contention that the sale of the land and issuance of the patent were in violation of the

treaty of Guadalupe Hidalgo, to a like question in the case of *Botiller v. Dominguez*, 130 U. S. 247, the supreme court says: "Two propositions under this statute are presented by counsel in support of the decision of the supreme court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens owned by them at the date of the treaty; and also in conflict with the rights of property under the constitution and laws of the United States, so far as it may affect titles perfected under Mexico. The second proposition is that the statute was not intended to apply to claims which were supported by a complete and perfect title from the Mexican government, but, on the contrary, only to such as were imperfect, inchoate, and equitable in their character, without being a strict legal title. With regard to the first of these propositions, it may be said that, so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard."

The proposition that the grantors of the plaintiffs in error derived their title from the decree of the Spanish courts relative to crown lands passed in 1813 is

equally untenable, under the rulings of the supreme court in the case of U. S. v. Vallejo, 1 Black, 541. It is held that the decree of the Spanish cortes, being inapplicable to the state of things which existed in Mexico after the revolution of 1820, could not have continued in force unless expressly recognized by the Mexican congress, and not then without being essentially modified. The Spanish system of disposing of public lands was very different from that provided for by the Mexican law of 1828. The two laws being repugnant and inconsistent, the former was repealed. The laws of 1824 and the regulations of 1828 are the only laws of Mexico on the subject of granting public lands in the territories, except those regulating towns and missions. It is evident that, if the plaintiff in error has any rights to the land in question growing out of the Spanish and Mexican claims set up by him, they are of an inchoate character, and, according to the decisions of the supreme court above referred to, are such as are reserved by congress to be determined by the political department of the government, or by such tribunal as may be, by an act of congress, authorized to try and determine them; and it is equally clear that this court has not been clothed with such authority. The rulings of the court below, which are assigned as error, being in accord with the decisions of the supreme court of the United States upon the question involved, the judgment below will be affirmed.

O'BRIEN, C. J., and FREEMAN and McFIE, JJ.,
concur.

[No 411. January 6, 1892.]

BOARD OF COUNTY COMMISSIONERS OF SAN
MIGUEL COUNTY, PLAINTIFF IN ERROR, V.
WILLIAM L. PIERCE, DEFENDANT IN ERROR.

DISINCORPORATED CITIES, PRESENTATION OF CLAIMS AGAINST.—In a suit, by bill in equity, against the board of county commissioners of San Miguel county, to compel the payment of a claim against the former city of Las Vegas, disincorporated under chapter 38, Laws, 1884, by the levy of a special tax for that purpose, where it appeared plaintiff held warrants issued by said city on its treasurer before its disincorporation, and presented them to the treasurer of said county for payment, without having presented them to said board for allowance, as required by section 3, of said act, and, on refusal of payment, brought suit—Held: The county was, solely by operation of the statute, a mere auditing and collecting agent for the creditors of the defunct corporation, with power to collect, by the levy of a special tax, out of the assets of the deceased city, a sufficient sum to pay all claims duly presented and allowed. Plaintiff, not having presented his claim for allowance, as required by section 3, chapter 38, Laws, 1884, can not recover.

ID.—LIMITATION.—Where, in such case, it further appeared that the claim in question was not presented within the period prescribed by section 3, of the statute cited supra—Held: While, in its view of this case, the court does not deem it necessary to pass upon the question of the legality or reasonableness of the six months' limitation, it is of the opinion that the period prescribed is reasonable and mandatory, and that a claim not presented within that period, without legal excuse, is barred by the statute.

ERROR, from a decree in favor of plaintiff, to the Fourth Judicial District Court, San Miguel County. Decree reversed.

The facts are stated in the opinion of the court.

LA FAYETTE EMMETT and THOMAS B. CATRON for plaintiff in error.

E. V. LONG for defendant in error.

O'BRIEN, C. J.—The former city of Las Vegas had been incorporated as such in pursuance of a terri-

torial statute enacted February 11, 1880, and so continued until April 1, 1884, when it was disincorporated, in accordance with the provisions of chapter 38, Laws, 1884. The disincorporating act provides: "Sec. 3. It shall be the duty of said (county) commissioners of the respective counties in which said cities are situated to ascertain the amount of the indebtedness due and owing by said cities, and the name and names of the person or persons to whom any amount is due, and for the purpose every person or persons who may have a claim against such city shall within six months from the passage of this act, and not afterward, present the same to said board of commissioners, at any regular session held during that time; and it is hereby made the duty of said county commissioners to approve all just claims and proper and legal liabilities heretofore contracted by said cities, and reject all such claims which in their judgment are illegal and improper." Section 4 provides for an appeal to the district court from the decision of the county commissioners. "Sec. 5. Whenever the whole indebtedness of such cities shall be fully and finally ascertained, it shall be the duty of the respective county commissioners to levy, or cause to be levied, a special tax upon all the taxable property situate within the limits of said cities in said counties, for five years thereafter, amounting in each year to the one fifth part of said indebtedness, so as to pay off and liquidate the whole of said indebtedness within said five years. Sec. 6. Whenever said indebtedness shall be ascertained as provided in the foregoing section, it shall be the duty of said board of county commissioners to cause to be published in any newspaper published in the respective counties a notice, for the period of thirty days, requiring all parties to present to said board of county commissioners their approved accounts, and the said board of county commissioners shall thereupon give to the holder of the

same five warrants, each for the one fifth of the whole amount due, respectively, and to be payable on the first day of January of the five years next following, respectively, and payable out of the funds raised by said special tax." "Sec. 9. All approved accounts provided for in section 6 of this act must be presented to said county commissioners within four months from the date of the publishing of such notice, and not afterward." Before the disincorporation of Las Vegas the city council had issued to divers persons warrants upon the city treasurer payable to the order of the persons named for various amounts. Some of these warrants, representing in the aggregate \$806, unpaid by the city at the time of disincorporation, the defendant in error held or owned, by indorsement or otherwise, at and before the commencement of this action. These warrants were afterward presented to the county treasurer for payment; and, on his refusal to pay, defendant in error, without further action, filed his bill in equity, alleging in substance the facts heretofore stated, praying judgment against the defendant county for the amount of his warrants; that defendant be ordered to pay the same to levy a tax therefor; and for a discovery of the books, records, and papers of the defunct city in defendant's custody. A general demurrer, on several grounds, was tendered to the bill. On hearing, the same was overruled, and the defendant answered over, alleging the various omissions and errors apparent upon the face of the complaint, and certain facts showing that complainant was not entitled to the relief sought. Thereafter the cause was tried to the court upon the pleadings and the stipulation of facts following: "(1) That the warrants sued upon in the above entitled cause are signed by the officers by whom they purport to be signed, and that the consideration for said warrants is set forth on the face of the respective warrants. (2) It is moreover agreed that the plaintiff

never presented the said warrants to defendant for payment or allowance until after the six months mentioned in the act of April 1, 1884, entitled, 'An act in reference to incorporated cities;' and, further, that there were several public sessions of the board of county commissioners of San Miguel county held during the six months immediately after the passage of said act. (3) And, further, that said warrants were never presented to said board for audit or allowance, but were presented to the treasurer of the county for payment before suit was brought." The bill of complaint, after alleging the incorporation of the city, the issuance and indorsement to plaintiff of the warrants in suit, and the subsequent disincorporation of the city, proceeds, that thereby "the said defendant became and now is liable and responsible for the payment of the indebtedness of said city of Las Vegas, and the particular indebtedness heretofore specially recited;" "that there is due your orator and owing to him from the defendant, on and for said claims and demands aforesaid, the sum of eight hundred and six (\$806) dollars; that due demand for the payment thereof by and from the defendant has been made by your orator, but the same was refused, and not paid."

The court below, on the hearing of the cause, upon the pleadings and stipulation, rendered judgment against the defendant county for \$1,049.31, the amount, with interest, due on the warrants in suit. The judgment is here for review upon writ of error brought by the county commissioners. If such a proceeding as this were contemplated or authorized by the statute cited, it should have been brought against the county, not as the substitute or successor of the disincorporated city, but as a tribunal or agency created by the statute to audit, allow, and discharge, in the manner therein provided, all approved, unpaid obligations of the defunct city. The proceed-

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ings are purely statutory. The county is a stranger to the official acts of the city council. The debts evidenced by the warrants in question are not transferred to the county for payment out of funds derived from the general taxation of the property of the county, but the same are to be paid from funds levied as a special tax upon all the taxable property situate within the limits of said city. As the indebtedness sued for was never incurred by the county, its liability therefor must be measured by the express or implied terms of the act authorizing it to provide for its payment. The disincorporating act requires the holder of city warrants to present the same to the board of county commissioners for approval or rejection within six months after the passage of the act. There is no allegation in the bill of complaint that such presentation was ever made, and the stipulation admits that these claims were never so presented. On what theory, then, does complainant predicate his right to hold the county liable under a statute, the cardinal requirement of which he admits that he has disregarded? The act invoked by defendant in error does not purport to transfer to the county the legal liability of the city to pay these warrants. It merely designates the board of county commissioners as a suitable agency for the purpose of ascertaining and providing a fund for the payment of the approved legal obligations of the disincorporated city. But the relation of debtor and creditor—never having existed, with regard to these orders, between the plaintiff and the defendant—was not created by the act, and no personal judgment in a suit of this nature could, in any event, be rendered against the county for the amount of the indebtedness. The liabilities and remedies of the respective parties can not exceed the terms of the act creating them. Had plaintiff made the requisite application for the allowance and approval of his claims, and had the county board failed to do its duty

in the premises, an appeal lay from the adverse decision to the district court; and upon such appeal the court could render judgment approving or disapproving the whole or any part of such account or claim, as the same would appear just and proper. Section 4, chapter 38, supra. Had plaintiff complied with these requirements, he would have pursued the only course available under the statute; and, if he prevailed in either course, he would have been entitled to an adequate remedy, by mandamus or otherwise, requiring the county commissioners to levy a tax in pursuance of law to pay the claim allowed. Plaintiff had no other remedy against this defendant, and no authority can be found in the disincorporating act countenancing the proceedings pursued in this action. The county became, solely by operation of the law cited, a mere auditing and collecting agent for the creditors of a defunct municipal corporation, empowered to make by special tax out of the assets of the dead city, in the manner prescribed, a sufficient amount to discharge all claims duly presented and allowed. The county treasurer had no official duty to perform in those proceedings. The claims allowed and approved were within four months to be superseded by other evidences of indebtedness. "And the said board of county commissioners shall thereupon give to the holder of the same five warrants, each for one fifth of the whole amount, due, respectively, and to be payable on the first day of January of the five years next following, respectively, and payable out of the funds raised by said special tax." Section 6, chapter 38, supra. Hence it was an idle ceremony to present the original warrants, even if approved, to the county treasurer. In no event had he any authority to recognize or pay them. They had no legal validity until presentation and allowance by the board in the first instance. Subsequently, on their surrender to the board, five warrants, of equal amount

in the aggregate, each payable on the first day of January, on the five following years, were to be delivered to the claimant in lieu of the claim surrendered. The latter were the "orders," and the only orders, which the county was authorized to pay. A substantially strict compliance with the requirements of the statute was a condition precedent of the collectibility of these claims. The remedy was exclusive, and plaintiff, not having followed it in any of its essential particulars, can take nothing by his action.

This view of the case renders it unnecessary to pass upon the validity or reasonableness of the six months' limitation. We may say, however, LIMITATION. that we consider the period prescribed reasonable and mandatory, and that a claim not presented within the six months without legal excuse, is barred by the statute. We are led to this conclusion, in a great measure, in view of the character of the tribunal empowered to audit the claims. We doubt if such special tribunal can assume jurisdiction after the expiration of the period fixed by the statute conferring the power. If this works hardship, the remedy must be supplied by the legislature, and not by the courts. The validity of the disincorporating act, as to varying the terms of the city's obligations, etc., is neither considered nor determined. The judgment below is reversed.

McFIE, SEEDS, FREEMAN, and LEE, JJ., concur.

[No. 476. January 6, 1892.]

EDWARD MEDLER, APPELLANT, v. ALBU-
QUERQUE HOTEL & OPERA HOUSE
COMPANY ET AL., APPELLEES.

CORPORATIONS—SUBSCRIPTION—BILL IN EQUITY—MASTER'S REPORT—

EXCEPTIONS.—In a suit, by bill in chancery, to subject certain stock subscribed to defendant company to the payment of an execution issued on a judgment against the company, on a return of nulla bona, where the case was referred to a master to take proof and report with his findings thereon, the chancellor, on exceptions made to the master's report, did not err in refusing to give any weight to the findings of the master, but was justified in considering the testimony as though it had been originally heard by himself.

ID.—FINDINGS OF CHANCELLOR—EVIDENCE.—In such case the findings of the chancellor will not be reversed, unless clearly opposed to the evidence.

ID.—ISSUE OF STOCK—FRAUD—EVIDENCE—AMENDMENT.—Where a certain amount of stock was issued, by the directors of a corporation, for a certain sum of money and certain lots of real estate, and the stock so issued was to be taken as fully paid up, and it was contended that the money and lots together were not equal in value to the stock, and that the issuing of the stock as fully paid up was a fraud upon the creditors of the corporation; but there was a diversity of opinion as to the value of the lots, and the testimony did not show such a discrepancy between the value of the lots and the value of the stock as to raise the presumption of fraud in law, and there was no testimony to show fraud in fact, the chancellor did not err in refusing to allow complainant to amend his complaint after the case had been passed upon by the master, even had the request been made in time, a point upon which the court does not pass, as unnecessary to decide.

ID.—SUBSCRIPTION—STOCKHOLDER.—Where a person was granted the privilege of subscribing to the stock of a corporation by conforming to certain preliminary requirements, and absolutely refused to take the stock, though one of the incorporators and vice-president of the corporation, he was not in fact a stockholder.

APPEAL, from a decree in favor of defendant, from the Second Judicial District Court, Bernalillo County. Decree affirmed.

The facts are stated in the opinion of the court.

WILLIAM H. WHITEMAN for appellant.

Every substantial question of fact found by the master, the court below overruled and set aside, and undertook to say upon which side the weight of evidence lay. This is contrary to the rule established by this court. *Huntington v. Moore*, 1 N. M. 503; *Newcomb v. White*, 5 N. M. 435. See, also, *Izard v. Bodine*, 1 Stock. 309; *Sinnickson v. Bruere*, Id. 659; *Merriam v. Baxter*, 14 Vt. 514; *Adams v. Brown*, 7 Cush. 222; *Reed v. Reed*, 10 Pick. 398-400; *Howe v. Russell*, 36 Me. 115; *McKinney v. Pura*, 5 Ind. 422; *State v. McIntire*, 53 Me. 214; *Pierce v. Faunce*, Id. 351, *Stimpson v. Green*, 13 Allen, 326; *McDougal v. Dougherty*, 11 Ga. 570; *McDaniels v. Harbour*, 43 Vt. 460; *Rowan v. State Bank*, 45 Id. 162; *White v. Hampton*, 10 Iowa, 238; *Howard v. Scott*, 50 Vt. 48; *Richards v. Todd*, 127 Mass. 167; *Holabird v. Burr*, 17 Conn. 563; *Ashmead v. Colby*, 26 Id. 287; *Holmes v. Holmes*, 3 C. E. Green (N. J.), 141; *National Bank v. Sprague*, 8 Id. 83; *Tilghman v. Proctor*, 125 U. S. 149.

The great difference existing between the value the expert witnesses placed upon the property justified the court in declaring that as a matter of law the transaction was fraudulent both as against the creditors of the corporation and such stockholders as did not accept the conditions of that order. *Cook on Stockholders*, 34, et seq.; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 Id. 100; *Osgood v. King*, 42 Iowa, 478; *Chisholm Bros. v. Forney*, 65 Id. 140; *Sawyer v. Hoag*, 17 Wall. 620; *Flinn v. Bagley*, 7 Fed. Rep. 785; *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 382.

The principle maintained in the court below is an English doctrine, which has not been favored in the courts of this country, and especially in the federal

courts. *Flinn v. Bagley*, 7 Fed. Rep. 785; *Upton v. Tribilcock*, 91 U. S. 45; *Hawley v. Upton*, 102 Id. 314.

The rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument applies only to the parties to the instrument. Third parties may prove by parol the intention of the parties, and that the writing is contrary to the truth. 1 Greenlf. Ev., sec. 279.

The stockholders, at least, negatively ratified the irregular subscription, if it was irregular, and are estopped from setting up their irregular act to the prejudice of the appellant. *Cook on Stockholders*, sec. 684, note 4; *Supervisors v. Schenck*, 5 Wall. 782; *Chubb v. Upton*, 95 U. S. 667; *National Bank v. Graham*, 100 U. S. 701; *Kent v. Quicksilver M. Co.*, 78 N. Y. 159-187; *Miners Ditch Co. v. Tellerback*, 37 Cal. 587.

Section 201, Compiled Laws, 1884, prescribes the manner in which stock may be canceled for unpaid subscription or assessment. Or the company might have sued in *assumpsit* at common law for the amount of the subscription. *Cook on Stockholders*, 121, et. seq.

A subscription made to the capital stock of a corporation can not be withdrawn, waived, or canceled, even by the unanimous consent of the stockholders to the prejudice of a creditor. *Cook on Stockholders*, 168, et seq.; *Burke v. Smith*, 16 Wall. 390; *Sawyer v. Hoag*, 17 Wall. 620.

It is well settled that the acceptance by a creditor of a note for a prior existing indebtedness is not a novation of the debt, unless so accepted by the creditor. *Bouv. Law. Dict.*, 247; *Peter v. Beverly*, 10 Pet. 567.

Facts having been developed on the trial, which were material to appellant's cause, and of which he

had no knowledge when his bill was filed, he had a right to an order allowing him to amend his bill, and it was error to refuse to allow such amendment. Sec. 1911, Comp. Laws, 1884; 1 Danl. Chy. Pl. and Pr. 418; *The Tremalo Co. Patent*, 23 Wall. 518; *Neale v. Neale*, 9 Wall. 1; *Hardin v. Boyd*, 113 U. S. 761.

H. B. FERGUSSON and BERNARD S. RODEY for appellees.

SEEDS, J.—This was a chancery case from the Second judicial district, in which the complainant and appellant, Edward Medler, sues Franz Huning and Frank W. Smith, defendants and appellees, to compel them to pay up their alleged balances due upon stock which it is charged they had subscribed for in the Albuquerque Hotel & Opera House Company, and to make said balances, when so paid, subject to an execution which had been issued upon a judgment rendered in favor of the complainant and against the respondent, the Albuquerque Hotel & Opera House Company; said judgment being rendered for labor performed by the said Medler under a contract to build a hotel for the Albuquerque Hotel & Opera House Company. The hotel had been built in accordance with the contract. A partial settlement had been made with the company, but it had ultimately failed to pay about \$4,406.78, for which the judgment, with interest, was rendered for \$5,651.25. Execution was issued upon the judgment against the company, and returned nulla bona. The bill sets forth the above facts, and also that the defendants Franz Huning and Frank W. Smith were stockholders in said Albuquerque Hotel & Opera House Company, and had become so by subscription at the organization of the company, about February 8, 1882; that said stock had not been fully paid up; and it prays that the balances due upon said stock from the respondents be decreed to be paid

to the plaintiff upon his judgment against the company. To this bill the respondent Franz Huning demurred, but the demurrer was overruled. Afterward the respondents filed separate answers. The answers raise distinct and different issues in part, and hence the decision will have to be of such a dual character as to distinctly treat all the issues fairly raised, and necessary to a decision. The respondent Frank W. Smith, in his answer, denied all the allegations of the bill; denied that he was ever a stockholder of the company, but he charged the fact to be that he was originally one of the promoters to build a hotel and opera house, and not alone to build a hotel; that after others of the original promoters had gone on to build the hotel alone, "they duly and legally deposed" him from any and all connection with the scheme; that he never was entitled to any stock in said company, and there was never a share of the stock issued to him, and that he never complied with the requirements of law sufficiently to entitle him to any stock, or to make him liable to the creditors of the company. He further charged that the complainant, Medler, was equitably estopped from claiming any liability from him, because he says that the complainant afterward became a stockholder of the company, and as such stockholder participated in meetings which borrowed money to pay the complainant for his contract for building the hotel, and took part in certain meetings wherein the said Smith was discharged, deposed, and forever debarred from having any claim or right in said company. The respondent Franz Huning filed three pleas to the bill, in which, after admitting some of the allegations of the bill and denying others, alleged that, while the capital stock was fixed at \$100,000, he denied that it was divided into two thousand shares of \$50 each, but charged that it was divided into one thousand shares of \$100 each; that, at the time the company became indebted to

Medler, all the stock subscribed by him had been fully paid up; that, while he had originally owned one hundred and forty-two shares of the stock, yet that, prior to the date of the company's becoming indebted to Medler upon the note given him by the company (upon which the judgment had been given in Medler's favor), he (Huning) had returned forty-one of those shares to the company in pursuance of an agreement with Medler by which he was to receive from the company, as part of his contract price, \$10,000 of paid up stock, and that Medler took said stock as fully paid up stock, knowing the facts in regard to said stock fully. That the complainant, Medler, when he took the note for his debt, "extended credit alone to the company, knowing at the time the exact state of the subscription lists to said company, at least so far as this defendant was concerned." To the answer of the respondent, Smith, and the pleas of the respondent, Huning, the complainant filed replications, and thereupon the following entry was made of record by the court, sending the matter to a master: "It is also ordered that this cause be referred to N. C. Collier, who is hereby appointed special master herein, to take proofs, and report the same with his findings thereon, with all convenient speed."

In accordance with the order the master proceeded to take proofs and reported the same with his findings. He found substantially as follows: (1) That the Albuquerque Hotel & Opera House Company was duly incorporated February 11, 1882, to build an opera house and hotel, either together or separately; that the capital stock was \$100,000, divided into two thousand shares of \$50 each; that the respondents, Huning and Smith, were among the incorporators, and were named as two of the directors. (2) That upon February 25, 1882, at a meeting of the stockholders, at which Huning was present, he was elected

president, and the respondent, Smith, was elected vice-president. The secretary was authorized to open books for stock subscription. (3) That between February 25, 1882, and July 10, 1882, the said respondents, Huning and Smith, with others, signed for one hundred and forty-two shares each, "to be issued under the charter and by-laws of said company, of the par value of one hundred dollars each." (4) That on March 30, 1882, the respondents, Huning and Smith, as directors, attended a meeting of said board of directors, and authorized the incurring of liabilities by said company toward the erection of a hotel. (5) That July 10, 1882, a stockholders' meeting was held, and the respondents, Huning and Smith, were elected directors of said company, and by the directors they were elected president and vice-president, and so considered by the company up to the middle of December, 1884. (6) That subsequent to July 10, 1882, the respondent, Smith, acted as director, by giving directions about the building of the foundation for the hotel, and sometimes consulted with other directors as to the progress of the scheme to build a hotel, but did not attend a meeting of said board after March 30, 1882. (7) That the arrangement by which the stockholders turned over certain land held by them, in the immediate vicinity of the hotel, together with \$9,092, in full payment of their stock, was in law a fraud and failed to make such full payment, although there was no question of the good faith of the parties as a matter of fact. (8) That there was no evidence that Smith had legally ever been deposed from the company. (9) That the complainant was at no time prior to the institution of this suit aware of the claim by the respondent, Smith, that he was not a stockholder in the company. (10) That no certificate of stock was ever issued to the respondent, Smith, as he had never paid for it,

nor was that number of shares ever issued to anyone else. (11) He found the other facts for the complainant, and recommended a decree against both defendants, and in favor of the complainant. Exceptions were taken to the report by both complainant and respondents, which were duly argued to the chancellor, who, upon hearing the same, gave a decree in favor of the respondents, and dismissed the bill. The complainant appeals.

The complainant and appellant makes sixteen assignments of error, which, for the purposes of this opinion, may be conveniently reduced to the following: (1) In disregarding and setting aside the finding of facts by the master. (2) In finding that the stock subscription paper was prepared and signed before the filing of the articles of incorporation with the secretary of the territory. (3) In finding that there was no subscription list. (4) In finding that the only subscription by the defendant Huning was that embraced in the order of the directors made March 22, 1883, wherein the directors purported to issue nine hundred and ninety-eight shares to various persons therein named for a certain cash payment, together with certain real estate, and declaring the shares thereby fully paid up and nonassessable. By this order the defendant Smith was entitled to one hundred and forty-two shares, if he would come in and pay his cost proportion. (5) In finding that the defendant Smith's subscription to the stock had been canceled by the mutual consent of all the parties. (6) In finding that the defendant Smith had been removed from the office of vice-president because he had refused to take his stock, and this was long before the complainant's contract with the company. (7) In finding that the arrangement whereby the stock was declared fully paid up and nonassessable was a fair arrangement, not to be set aside for overvaluation, unless it was proven that such

overvaluation was intentional and fraudulent. (8) In finding that the complainant was cognizant of the condition of the stock; that it was fully paid up; and that he himself held \$10,000 of said stock with said knowledge, and was a stockholder, with full knowledge of the affairs of the company, at the date of his contract with the company. These findings of the chancellor were made upon the hearing of the exceptions to the report of the master, and in each finding they were diametrically opposite to the findings of the master. The exceptions to the report were full and explicit.

The first question raised by the exceptions is this: Under what circumstances may the chancellor, upon the hearing of exceptions to the report of a master, set aside the findings of the master as to matters of fact?

BILL in equity:
master's report:
exceptions:
findings.

The complainant contends that, as the case has been referred to the master to hear the evidence, and report the same to the court, with his findings, the chancellor can not set aside the findings of facts unless it clearly appears that he has made a mistake, or has acted corruptly, or has made an erroneous application of the law to the facts. Among others, he cites two cases from this court (Newcomb v. White, 5 N. M. 435, and Huntington v. Moore, 1 N. M. 489) which it is insisted are decisive of this question. However, it is quite apparent that these cases are not in point. They simply hold that in the supreme court the report of a master upon matters of fact has the weight therein attached to them. In each of those cases, too, the exceptions made to the findings at the hearing before the master, and made to his report, were heard by the chancellor, and overruled, so that there was no question of conflict between the master and the chancellor upon the facts brought to the attention of the court. It is very clear that in the supreme court the rule is that "in dealing with these exceptions"—that is, the exceptions taken

to the master's report—"the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." *Tilghman v. Proctor*, 125 U. S. 136, 149; *Callaghan v. Myers*, 128 U. S. 617, 666; *Richards v. Todd*, 127 Mass. 167, 172; *Howe v. Russell*, 36 Minn. 115; *Pierce v. Faunce*, 53 Minn. 351; *Newcomb v. White*, 5 N. M. 435; *Huntington v. Moore*, 1 N. M. 489, 503.

But in this case it is insisted that the chancellor, upon the hearing of the exceptions to the report of the master, is bound by the same rule as in the supreme court, and that, as it did not clearly appear that the master had made an error or mistake, it was error for him to set aside the findings upon his mere judgment of the weight of the testimony. This question has never been decided in this court. It has been decided both ways by different courts. Daniel in his work upon Chancery Practice, in treating of the practice in regard to master's reports, says: "After this report was made the cause came again before the court for a final settlement. * * * The parties might, however, by excepting to the report, appeal to the court against the decision of the master, and reopen all the questions that had been decided." Daniel Ch. Pr. & Pl. 1322. This is undoubtedly good law, but it is quite evident that it does not throw any light upon the question here raised, which is, should the chancellor reverse the findings of the master upon matters of fact merely upon his judgment of the weight of the evidence, or only when the master has clearly made an error or mistake? In the case of *Bridges v. Sheldon*, 7 Fed. Rep. 17, 37, WHEELER, D. J., who was the chancellor, says: "The power of the court to set aside a report of the master is unquestioned; but it is not to be exercised capriciously

or otherwise, but for good cause, and mere differences of opinion as to the weight of evidence, when they exist, do not constitute good cause." Also, *In re Murray*, 13 Fed. Rep. 550; *Sinnickson v. Bruere*, Stock. Chancery (N. J.), 659; *Izard v. Bodine*, Id. 309; *Howard v. Scott*, 50 Vt. 48; *McDaniels v. Harbour*, 43 Vt. 460. In the case of *Izard v. Bodine*, supra, the chancellor says: "Where a matter of fact has been referred to a master, depending upon the testimony of witnesses conflicting in their opinion, and differing in their recollections of past events, the decision of the master ought not to be interfered with on his mere judgment of the facts, unless it is a very plain case of error or mistake." These cases in a greater or less degree hold, practically, that the same rule obtains in the proceedings before the chancellor as in those which are before the supreme court. On the other hand, in the case of *Near v. Lowe*, 23 N. W. Rep. (Mich.) 448, Judge COOLEY says: "Complainant raises certain legal questions: First, he insists that the report of the commissioner, like that of a referee at law, should be held a conclusive finding upon the facts, so far as it appeared there was any evidence to support it. But this is not the rule in equity. The judge must decide upon the facts on exceptions, according to his own view of what is established by proofs." Also, *Holmes v. Holmes*, 3 C. E. Green, 141; *Kimberly v. Arms*, 129 U. S. 512, 522. The last case cited would seem to carry out the idea that, while generally the rule is as stated by Judge COOLEY, yet in practice the chancellor will not arbitrarily take upon himself the duty of ignoring the report of the master, and passing upon the facts solely from the proofs introduced; for Judge BREWER said: "In practice it is not usual for the court to reject the report of a master, with his findings upon the matter referred to him, unless exceptions are taken to them, and brought to his attention, and upon exam-

ination the findings are found unsupported, or defective in some essential particular.” However, the effect of this decision is practically that in the case of the usual reference of a matter to a master to take testimony and report the same, or to find upon a particular issue, as an account, the report of the master is simply advisory; and while it is true that, in the absence of exceptions to the report, the chancellor will not usually set the report aside upon his own motion, yet, when there are exceptions to the report, he may refuse to consider the findings of fact by the master, and himself inquire into the weight of the testimony adduced, as well as into errors of law or mistakes as to the facts, and upon that weight solely make his findings for the purpose of a decree. Under the case of *Kimberly v. Arms*, supra, there arises another question, which might possibly be applicable here. In it the court says: “It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties.” And, when such a reference is made, then the findings of the master are to be considered as so far binding upon the chancellor as not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made; and they decided in this case that the chancellor had failed to give the findings of the master the weight they were entitled to. 129 U. S. 512, 525. In the case before us the order of reference does not say that it was by consent of parties. But as the record shows that the master did hear all the evidence, that he passed upon all the issues, and reported his findings both as to the facts and the law, and that there were no exceptions to such action by him, and the case of *Kimberly v. Arms*, supra, holds that a chancellor can not make such a reference without the consent of parties, the writer of this opinion conceives that it must be pre-

sumed that as a fact this reference was the same as that in the cited case, and that the findings of the master are entitled to the weight therein given them. However, the majority of the court do not so interpret the case before us, but consider it simply as a partial reference under the powers of the chancellor, and, as such, that the findings of facts of the master can be measured, if necessary, solely by an inquiry into the weight of the evidence. That being the law in this territory, it is plain that the chancellor in the lower court committed no error in refusing to give any weight to the findings of facts by the master, but was justified in considering the testimony as though it was originally heard by himself.

1. The question is now presented, however, what, if any, weight is to be given the findings of the master as to facts when the chancellor has found differently than he had? It would seem inevitable from the foregoing holding that the findings of the master must in such a case be entirely repudiated, and that we can only consider the testimony and the findings, if any, of the chancellor. But what weight is to be given the findings of the chancellor? The reason usually advanced for giving so much weight to the findings of a master—that he heard the witnesses, and beheld their demeanor upon the stand—does not apply to the case of the chancellor. Why, then, should any weight be given to his determination? Ought not this court, having all the evidence before it, as did the chancellor, pass upon it, unbiased by any presumptions or weight growing out of the chancellor's findings? The court think not, but consider that we should give some weight to the findings of the chancellor, and not reverse those findings unless clearly opposed to the evidence.

2. Was the stock subscription made before or after the organization of the company? It had no

date to it. The records of the company were very loosely and carelessly kept. The secretary inferred from certain data that it was made after the organization, but the exact date he could not say. He testifies positively that there had been one subscription started with the object of enlisting a large number of subscribers, but that it failed, and that afterward the stock subscription in question was made. But he fails in this evidence to say whether this was after the incorporation of the company or not. Upon the other hand, defendant Smith and the witness Wilson, who was a director and the treasurer of the company, both testify that the stock subscription in evidence was made as a preliminary effort to see what could be done in the way of starting the scheme afterward carried out. The testimony would lead one to believe that there were three subscriptions. There is much in the contention of the complainant that the order made after the incorporation of the company at one of the director's meetings, instructing the secretary to open stock books; the facts that the subscription was made in the secretary's book; that the company held stockholders' meetings, which could hardly have been done if there had been no stockholders,—all point to the fact that the stock subscription was made after the organization of the company. But, as there is much confusion in the testimony, if not contradiction, and as it can not be said that the finding of the chancellor was clearly opposed to the testimony, we will have to hold that there was no error in the finding.

3. If the above finding was correct, then, evidently, the shares in this company were ascertained and subscribed for either by the subscription made before the organization, or by the resolution adopted by the directors upon March 22, 1883, whereby the directors issued a certain amount of stock to various persons for \$9,092 and

ISSUE of stock:
fraud: evidence:
amendment.

twenty-eight lots of real estate, and the stock so issued was to be taken as fully paid up. The defendant Hunting received one hundred and forty-two shares; and the same number was allotted to the defendant Smith upon the condition that he paid his share of the cash already put into the hotel undertaking, and the real estate. The chancellor finds that this is the only subscription ever made. This finding must be held, under the rule above adopted, as correct. But the complainant contends that as the lots, together with the \$9,092, were only worth, at a fair and just valuation, not over fifty or sixty thousand dollars, that the issuing the stock as fully paid up was a fraud upon the creditors of the company. It is well settled in this country that the capital of a company is a trust fund for the benefit of creditors, and that an intentional overvaluation of property given for stock is such a fraud upon creditors as to give them the right to proceed against the holders of such stock for contribution of such amounts as will make the difference between a fair and just value of the property and the par value of the stock so issued. *Cook, Stocks*, sec. 34, et seq.; *Douglass v. Ireland*, 73 N. Y. 100; *Sawyer v. Hoag*, 17 Wall. 620; *Upton v. Tribilcock*, 91 U. S. 45. But there must be the intention upon the part of the parties to overvalue the property, which intention makes it fraudulent. Now in this case there is no evidence of such an intention. The master found distinctly that there was no such intention. The claimant insists, though, that the overvaluation was so great that apart from actual intention, and in law, it must be considered as a fraud of which creditors may take advantage. It is undoubtedly true that there could be such a condition of facts as would require a court so to hold. *Chisholm Bros. v. Forny*, 65 Iowa, 333. But in this case there was a diversity of opinion as to the value of the real estate turned in upon the stock issue; and we

think that, apart from the weight to be given the chancellor's finding, the testimony came far from showing that there was such a discrepancy between the value of the real estate and the value of the stock as to raise the presumption of fraud in law, and none whatever to show fraud in fact.

4. As, upon the facts in evidence, there was nothing to charge the defendants with fraud, there could have been no error in the chancellor's refusing the complainant the privilege of amending his complaint after the case had been passed upon by the master, even had the request come in time, which point it is unnecessary to decide. As, then, the defendant Huning had fully paid up his stock, the appellant could have no claim against him.

5. The complainant insists, even though the defendant Smith did not sign the subscription for stock after the organization of the company, SUBSCRIPTION:
stockholder. that, as he subscribed for stock in a company which was afterward incorporated, and as he was one of the incorporators, and attended at least one of its meetings, being its vice-president, he was thereby recognized as a member of the company, and he recognized his obligation to take the stock originally subscribed for. That one can thus obligate himself to take stock subscribed for before the organization of the company is now settled law. *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Buffalo v. Jamestown Railroad Co.*, 87 N. Y. 294. And, when the interest of creditors of the company is at stake, courts will scrutinize very carefully indeed any defense which endeavors to evade the responsibilities of such a subscription. If, then, the subscription to the stock in question was acted upon by the company afterward, certainly this defendant was in law a stockholder in this company. It is true that he claims that he withdrew from the company in a legal manner before the company be-

came in any way obligated to the complainant herein. We think that the proof shows this. But, in our view of the case, this makes no difference; for, if the finding of fact by the chancellor is correct, as above stated,—that the only issue of stock made by this company was that made March 22, 1883, wherein this defendant was granted the privilege of taking stock by conforming to certain preliminary requisites,—and as he failed and absolutely refused to take such stock, it is apparent that he was in fact never a stockholder in the company. This is the necessary consequence of the holding by the chancellor. It unquestionably leaves much of the evidence in an unsatisfactory condition. But that is invariably the case where the evidence is conflicting. We find no errors calling for a reversal of the case. The decree of the lower court is affirmed.

O'BRIEN, C. J., and FREEMAN and McFIE, JJ., concur. LEE, J., did not sit in this case.

[No. 435. January 6, 1892.]

WILSON WADDINGHAM ET AL., PLAINTIFFS IN
ERROR, V. FRANCISCO ROBLEDO ET AL.,
DEFENDANTS IN ERROR.

INJUNCTION—MULTIPLICITY OF SUITS—JURISDICTION—EQUITY.—Where a bill in equity was brought by the rightful owners of certain land to restrain the defendants, who, under an inchoate grant from the Mexican government, sought to appropriate, irrigate, and improve a part thereof to complainants' injury, from such appropriation and improvement, such owners, having no adequate remedy at law, without a multiplicity of suits and payment for such improvements under section 2270, Compiled Laws, 1884, the court had jurisdiction to grant the relief sought as to such portion of said land.

Id.—ADVERSE POSSESSION—REMEDY.—But, in such case, as to that portion of the land which had been in the actual, open, notorious, and adverse possession of the defendants, who had actually cultivated portions of it, and appropriated a portion of the water of a river running through the land for purposes of irrigation, complainants' remedy was by an action of ejectment at law. Equity will not interfere to restrain the enjoyment of such improvements, but will prevent the appropriation of new lands and the making of new improvements for further irrigation.

ERROR, from a decree in favor of defendants, to the Fourth Judicial District Court, San Miguel County. Decree reversed.

The facts are stated in the opinion of the court.

CATRON, KNAEBEL & CLANCY for plaintiffs in error.

FRANCIS DOWNS for defendants in error.

LEE, J.—On the seventh day of February, 1888, complainants filed in the court below their bill of complaint, which, omitting the formal parts, is as follows:

“ * * * Your orators, Wilson Waddingham and Julius G. Day, both residents of the county of New Haven and state of Connecticut, Louis Sulzbacher, a resident of the county of San Miguel and territory of New Mexico, and Thomas B. Catron, a resident of the county of Santa Fe and territory aforesaid, bring this their bill of complaint against Francisco Robledo, Francisco Lucero, Antonio Aloncon, Jose Apodaca, Feliz Garcia, all residents of the county of San Miguel and the territory of New Mexico, and also all their agents, employees, confederates, servants, and associates, privy to and participant in the grievances, wrongs, trespasses, and threats hereinafter complained of, their names being to your orators unknown, and they being very numerous, so that it is impracticable to proceed against them at present more specifically in this suit; and also John Dold, and Henry Dold, and Mary Dold,

lately residents of the said county of San Miguel, but who are now absent from the territory of New Mexico, and whose present places of residence are unknown to your orators; and thereupon your orators, complaining, say that heretofore, to wit, in the month of December, in the year eighteen hundred and eighty-seven, at the county of San Miguel, territory of New Mexico, they, together with the said John Dold, and Henry Dold, and Mary Dold owned, possessed, and were well seized of in fee, and they, together with the said John Dold, and Henry Dold, and Mary Dold, do still own and possess and are well seized of in fee, as tenants in common, all and singular, that certain tract or grant of land commonly known and called the 'Antonio Ortiz Grant,' situate in the said county of San Miguel and territory of New Mexico, which was on the twenty-eighth day of June, A. D. 1819, by the governor of the province of New Mexico, granted to one Antonio Ortiz, and which was afterward, to wit, on the third day of March, A. D. 1869, by the congress of the United States, duly confirmed as private land claim number 42 to the said original grantee, his heirs and legal representatives, under which confirmees your orators and the said John Dold, and Henry Dold, and Mary Dold derived their said title, possession, and seizin of, in, and to the said tract or grant of land, and by whom your orators and said John Dold, and Henry Dold, and Mary Dold were duly placed in possession of all and singular the same as owners thereof, long prior to the commission of the grievances and threats hereinafter mentioned, and which tract or grant of land is more particularly bounded and described as follows, to wit.'" Here follows a description of the Antonio Ortiz grant, and the allegation that it contains one hundred and sixty-three thousand, nine hundred and twenty-one and sixty-eight hundredths acres. "And your orators further show that because of the said absence from the territory of

the said John Dold, and Henry Dold, and Mary Dold, and of the urgency and immediate necessity, as hereinafter set forth, of seeking without delay the relief herein prayed, your orators have had no opportunity to apply to the said John Dold and Henry Dold for their consent to be united herein with your orators as parties complainant, and without such consent your orators have no authority to use the names of the said John Dold, and Henry Dold, and Mary Dold, or either thereof, as parties complainant to this bill; and, therefore, the said John Dold, and Henry Dold, and Mary Dold are made parties defendant to the same. Your orators further show that the said claim, ownership, possession, and seizin of your orators and the said defendants Dold, of, in, and to the said tract or grant of land are subject to the exception that certain small, specific parts of the said tract or grant of land are possessed and claimed by certain persons not parties to this suit, and who have no interest in the matters therein in controversy, and who are not privy to or participant in the grievances, trespasses, and threats hereinafter set forth. And your orators further show that, except as aforesaid, the said Wilson Waddingham and Julius G. Day are seized and possessed of sixty-one undivided sixty-third parts of the said tract or grant of land, and the said Louis Sulzbacher is seized and possessed of one undivided sixty-third part thereof, and the said Thomas B. Catron is seized and possessed of an undivided one hundred and eighty-ninth part thereof, and the said John Dold, and Henry Dold, and Mary Dold are seized and possessed of the remainder thereof. And your orators further show that a copious and valuable stream of water, known as the 'Gallinas River,' runs through the said tract of land in its natural channel and course, and to the extent that it so runs through the said tract or grant of land it is part of the real estate aforesaid of your orators and the said

John Dold, and Henry Dold, and Mary Dold; that the waters of the said stream, as they run in their said natural course or channel through the said tract or grant of land, are necessary and indispensable for the use and enjoyment of your orators' said real estate for the purpose of stock raising and agriculture; that the said tract or grant of land contains a large area of pasture ground sufficient and capable for the sustenance and maintenance of large and valuable herds of cattle and other live stock, and the same also contains many thousands of acres of lands well adapted to agricultural uses, but that your orators' use and enjoyment of their said real estate will be impaired and irreparably prejudiced and injured if the said stream of water shall be diverted, and the waters thereof consumed, and the said agricultural lands appropriated by means of the grievances, trespasses, and threats hereinafter specified. And your orators further show that the said defendants Francisco Robledo, Francisco Lucero, Antonio Aloncon, Jose Apodaca, and Feliz Garcia, and their said unknown agents, employees, servants, confederates, and associates, all conspiring and confederating together in that behalf, on or about the third day of January, A. D. 1888, began to construct, and are still constructing, near Los Torres, and within the limits of the said tract or grant of land, but not upon the said excepted parts, or any portion of the said excepted parts, a dam across the said Gallinas river, for the purpose and with the intent of impounding and holding the waters of the said river, and creating a great pond or reservoir on the said real estate of your orators and the said John Dold, and Henry Dold, and Mary Dold; and also began to construct, and are still constructing, a large ditch or acequia, extending from the said dam upon and across the said grant or tract of land, with the intent to carry the waters which might be collected and held by the said dam upon the said tract or grant of land, and

especially upon and across the said parts thereof, embracing many thousands of acres, aforesaid, which are well adapted to agriculture, and with the further intent to parcel out and divide among themselves many thousands of acres of the said agricultural land, the property, as aforesaid, of your orators and the said John Dold, and Henry Dold, and Mary Dold, and to irrigate the said agricultural land by means of the said ditch or acequia, and with the further intent to introduce upon the said agricultural lands, as well as upon other parts of the said grant or tract of land, numerous strange settlers, having no estate, right, title, interest, claim, or demand whatsoever, in law or in equity, of, in, or to the said tract or grant of land or the parts thereof so sought to be appropriated, and thereupon to cultivate, inhabit, use, and enjoy the said lands and the rents, issues, and profits thereof, to the exclusion and prejudice of your orators. And your orators further show that the said defendants and their confederates so hereby charged have already constructed the said ditch or acequia upon and across the said tract or grant of land for a greater distance than one mile, and they are still pursuing the said work of construction with the several intents aforesaid; and that by means of the said dam and ditch or acequia they are destroying and impairing the very substance of your orators' said estate in the premises, and committing irreparable injury to your orators' said freehold; and the said defendants and their confederates give out and threaten that they will continue to maintain the said dam, and create thereby a great pond or reservoir upon your orators' said real estate, and will continue the further construction of the said ditch or acequia for a much greater distance upon and across your orators' said real estate, and will enter upon, divide up, appropriate, inhabit, cultivate, and use your orators' said agricultural land, and will exclude your orators from their

possession, rights, and interests in the premises, and deprive them of the rents, issues, and profits of their said real estate, and will commit repeated and innumerable trespasses upon the said tract or grant of land and your orators' freehold therein, and will compel your orators to institute numerous suits at law for the recovery of the said lands so threatened to be unlawfully appropriated, unless such appropriation shall be prevented by this honorable court.

“And your orators further show that none of the said defendants, except the said John Dold and Henry Dold and Mary Dold, nor the said confederates, have or has any estate, right, title, interest, claim, or demand, at law or in equity, of, in, or to the said tract or grant of land, or any license, right, or authority whatever to construct or maintain the said dam, or to construct or maintain, use, or enjoy the said ditch or acequia, or to enter upon, possess, claim, inhabit, cultivate, use, or in any manner enjoy or appropriate the said agricultural land, or any part or parcel thereof. And your orators further show that no proceedings have ever been had or authorized for the condemnation or appropriation under the right of eminent domain of the lands and premises, or any part thereof, whereon the said dam has been so constructed, or whereon the said ditch has been in part constructed and is still constructing. And your orators further show that the said dam and the said pond or reservoir made thereby, and the said ditch or acequia, are each and all nuisances especially injurious to your orators, and neither your orators, nor any of them, nor the said John Dold, nor Henry Dold, nor Mary Dold, nor either of them, nor any one else privy to the title to the said tract or grant of land, or having any authority in that behalf, have or has ever consented to or authorized the said acts, misconduct, and threats, or any part thereof, of the said

defendants above complained of. And your orators further show that the said defendants, except the said John Dold and Henry Dold and Mary Dold, in pursuance of their said unlawful purpose and intent, have actually begun to stake out pretended allotments of the said agricultural land, with a view to the adverse occupancy thereof, and to the establishment of permanent improvements thereon, by which means, unless this court shall interfere by its injunction, lawful claims may be established on the part of such trespassers against your orators, under which your orators may be compelled, for the protection of their title in the premises, to pay for the said improvements against your orators' consent, and to your orators' manifest prejudice and disadvantage. And your orators further show that the said defendants, except the said John Dold and Henry Dold and Mary Dold, and the said confederates, are in great part wholly insolvent, and they are each and all of insufficient pecuniary means to respond to your orators in damages for the wrongs and injuries which they are now perpetrating as aforesaid, and which they threaten hereafter to continue. And your orators further aver that the said defendants, so trespassing and erecting and maintaining the said nuisances, although often requested by your orators to desist from the same, and to refrain from the continuance and further prosecution thereof, utterly refuse your orators' said request, and persist in their said inequitable and injurious misconduct. In consideration whereof, and forasmuch as your orators are remediless in the premises at common law, and can not have adequate relief, save by the aid and interposition of this court in equity, therefore your orators pray that the said Francisco Robledo, Francisco Lucero, Antonio Aloncon, Jose Apodaca, and Feliz Garcia, their agents, employees, confederates, servants, and associates may be restrained by writ of injunction, issuing out of this

court, under its seal, from proceeding further with the erection of the said dam across the Gallinas river, and from proceeding further with the construction of the said ditch or acequia over and upon the said tract or grant of land and from in any manner using the said dam or ditch or maintaining the same, and from parceling out or dividing among themselves, and from any manner using, the land on the said tract or grant of land which can be irrigated by the said ditch or acequia, and from further trespassing upon the said tract or grant of land, or any part thereof, and also from molesting or interfering with your orators or their attorneys, agents, servants, lessees, tenants, employees, or associates in their use and enjoyment of their said real estate; and that your orators may have such further and other relief in the premises as may be just and equitable, together with their reasonable costs and charges in this behalf." * * *

A preliminary injunction was issued, and, service of process being had on certain of the defendants, on the fifth day of March, A. D. 1888, those defendants entered an appearance in the clerk's office, and filed a demurrer to the bill of complaint. The demurrer is not embraced in the record, and we are not informed as to the objections attempted to be pointed out. However, on the fifteenth day of March, 1888, all of the defendants against whom by name relief was sought by leave of the court withdrew their demurrer, and filed an answer, which, omitting the formal parts, is as follows: " * * * These defendants, * * * answering, say that they deny that they, the said complainants, or any of them, still own, possess, and are well seized in fee as tenants in common of the tract of land mentioned and described in the said bill of complaint; that said defendants had no positive knowledge whether or not said tract of land so mentioned and described was ever granted by the governor of the

province of New Mexico to one Antonio Ortiz on the twenty-eighth day of June, A. D. 1819, or at any other time; that said defendants are informed and believe, and charge the truth to be, that under the laws, and by virtue of the customs and usages, of the government of the republic of Mexico existing and in force at the time of the treaty, commonly known as the 'Treaty of Guadalupe Hidalgo,' between the United States of America and the republic of Mexico, executed on the second day of February, A. D. 1848, that the said grant of land to the said Antonio Ortiz, if any such was ever made, was null and void, and for many years prior to the making of the said treaty the said grant had no validity whatever. Said defendants, further answering, say that on the tenth day of March, A. D. 1846, the departmental assembly of the department of New Mexico, in the name of the republic of Mexico, and under and by virtue of the authority vested in said assembly by the laws of the said government of Mexico, granted a tract of land situate in said county of San Miguel, and on the said Gallinas river, known as 'The Chaperito,' to Jose Garcia, Santiago Martin, Jose Tapia, Jose Manuel Tapia, Prudentio Tapia, Ignacio Aragon, Julian Garcia, Jose Antonio Tapia, Fernando Lucero, Jose Armijo, Juan Madrid, Francisco Salas, Jose Rael, Lugardo Blea, Lorenzo Marques, Rafael Lucero, Jose Nieva Lucero, Desiderio Maese, Miguel Ramon Saies, Tomas Saies, Gabriel Baca, Felipe Madrid, Rafael Marques, Jesus Gonzales, Gabriel Gonzales, Jose Duran, Pablo Olguin, and Jose Baca. That the boundaries of the said tract of land thus granted are as follows, to wit: On the north, the mouth of the canon; on the south, the possession of those of the Puerticito; on the east, the point of the mesa of the Conchas; on the west, the point of the mesa of the Aguilers. That the said grantees were placed in possession of said tract of land thus granted in March, A. D. 1846, and they, their heirs and assigns,

have ever since remained on the same in quiet, peaceable, undisturbed, and adverse possession of the same continuously down to the time of filing of said bill of complaint. That the claim of the settlers and owners of the said Chaperito grant of land has been duly filed in the office of the United States surveyor general of the territory of New Mexico, in accordance with the provisions of the act of congress of 1854, establishing said office, and the rules and instructions issued by the commissioner of the general land office, August 21, 1854, and asking that said tract of land be approved and confirmed to the owners thereof in the name of the original grantees, and that said claim is now pending in the office of the said surveyor general. That the grant of land is situated within the boundaries of the tract of land mentioned and described in said bill of complaint. That all the trespasses and grievances complained of in said bill have been committed, if committed at all, within the boundaries of the said Chaperito grant of land. That said defendants are well seized in fee as tenants in common by inheritance and purchase from the said original grantees, or their legal representatives, of the said Chaperito grant of land. That they, the said defendants, and those through whom they deraign their title have had possession of the said Chaperito grant of land, granted as aforesaid by the government of Mexico, and have held and claimed the same ever since the tenth day of March, A. D. 1846, and are holding and claiming the said tract of land by virtue of said grant and by divers deeds of conveyance, devices, and other assurances purporting to convey an estate in fee-simple as tenants in common to said Chaperito tract of land; and that no claim by a suit at law or equity has been set up or made to said tract of land and effectually prosecuted within two years next preceding the filing of said bill of complaint. Defendants admit that they have constructed and were

constructing a dam across the said Gallinas river, and had begun and were constructing a large ditch or acequia from said dam, with the intent to carry the waters which might be collected and held by said dam across certain parts of the tract of land described and mentioned in said bill of complaint; but said defendants, further answering, say that said dam and said ditch or acequia were constructed and being constructed wholly within the boundaries of the said Chaperito grant of land; that the waters of the said Gallinas river, flowing through the said Chaperito grant of land, have been legally used and enjoyed by said defendants, as tenants in common with the other settlers, owners, and claimants of the said Chaperito grant, ever since the tenth day of March, A. D. 1846, for the purpose of irrigating their cultivated lands on said grant; that for the purpose of irrigating more fully these lands already cultivated, and for the purpose of enlarging the area of cultivable land within the boundaries of the said Chaperito tract of land, said defendants admit that, in common with their cotenants on said Chaperito grant, they constructed and were constructing, as they had a legal right to do, said dam and said acequia, and for no other purpose. Defendants further deny that said complainants have any estate, right, title, interest, claim, or demand whatsoever, in law or equity, of, in, or to the said tract of land upon which said dam is and was being constructed, or the land across which was being constructed said large ditch or acequia; and defendants deny that said complainants have any legal or equitable right to cultivate, inhabit, use, and enjoy said tract of the Chaperito grant where is situated said dam, and across which is constructed or being constructed said ditch or acequia, or to use and enjoy the rents, issues, and profits thereof. Defendants deny that the building and maintaining said dam and said large ditch or acequia will be a nuisance, and they deny that

it will injure, impair, and impartially prejudice the land mentioned and described in said bill of complaint; that, on the contrary, it will greatly benefit said lands, and greatly enhance their value, by increasing the area of both the cultivable lands and the grazing, and largely increase the capability of said lands for the purpose of agriculture and stock raising. Defendants deny that they are in a great part wholly insolvent, and that they, or each and all of them, are of insufficient pecuniary means to respond to said complainants in damages for any wrong or injury which they have done, or may continue to do, as alleged and charged in said bill of complaint.” * * *

On the seventeenth of May a motion to dissolve the injunction was filed, and, after argument and on the twenty-eighth of May, the temporary injunction, which had been granted in accordance with the prayer of the bill, was so far modified by the then chief justice “as to permit defendants to construct all acequias necessary for the full irrigation and enjoyment of all lands heretofore actually occupied by defendants, but said defendants are restricted from taking up any new or additional tracts.” Issue being joined by the filing of a replication, the case went to a master, to whom were submitted voluminous proofs, and the master found the material facts of the case to be as follows:

“(1) * * * On the twenty-eighth of June, 1819, the governor of New Mexico, then a province of Old Mexico, granted to one Antonio Ortiz a large tract of land on the Gallinas river, in San Miguel county, containing, according to the survey made by the United States government, one hundred and sixty-three thousand, nine hundred and twenty-one and sixty-eight hundredths acres of land. This grant was presented to the surveyor general of New Mexico for approval, and was reported by him to the department of the interior, and thence to congress, as private land claim number

42. It was duly confirmed by act of congress on the third day of March, A. D. 1869, to the heirs and legal representatives of the original grantee, Antonio Ortiz, and was afterward surveyed and patented by the United States government to such heirs and legal representatives on the — day of —, 1883. (2) By the mesne conveyances introduced in evidence it appears that all the right and title of the heirs and legal representatives of Antonio Ortiz in and to such grant of land is vested in the complainants in the following shares or proportions: Wilson Waddingham and Julius G. Day, the undivided sixty-one sixty-third part; Louis Sulzbacher, the undivided one sixty-third part; T. B. Catron, the undivided one hundred and eighty-ninth part; and John Dold, Henry Dold, and Mary Dold, defendants, the undivided remainder of said grant. (3) It also appears that Antonio Ortiz, the original grantee, occupied the land under the grant for a number of years, keeping his cattle and other live stock there, claiming it as his own, and it being generally recognized as his property,—‘the sitio of Antonio Ortiz.’ Also that some of the assignees of the heirs of Antonio Ortiz, claiming interest in the whole grant, have occupied parts of it almost continuously for the last twenty-five or thirty years, doing a little farming, but principally for stock raising and grazing purposes, having permanent ranches and buildings established on the tract of land. (4) The Gallinas river, a stream of permanent running water, and of considerable size, flows centrally and in a southeasterly direction through the grant, and constitutes its principal water supply. (5) Along this stream there are considerable settlements of the native population, mostly in several small towns and placitas, the largest of which is Chaperito, situate near the center, or a little nearer the northwest corner than the center, of the tract of land. The settlers are mostly engaged in farming the bottom or till-

able lands along the river. The lands thus actually plowed and cultivated north of Los Torres on the grant do not exceed five hundred acres, and those south of Los Torres and on the grant are estimated not to exceed one thousand acres. These settlers have at various times and different places constructed dams on the Gallinas river, and have taken out the necessary acequias to irrigate the cultivated lands, and several such acequias are now in use. (6) Beside the settlement on the grant along the Gallinas river there are other smaller settlements on the Conchas and in the Canon Aguilar. The entire number of men, women, and children residing on the grant is estimated by one witness at fifteen hundred. A number of the families own domestic animals, consisting of cattle, horses, burros, and goats, which graze upon the surrounding pasture lands. The pasture lands have been so used since the settlements were first made. The settlers have also obtained their firewood principally from the surrounding country on the grant, and have used timber from there and from other places not on the grant." The master also found that the defendants were in possession of certain small parcels of land, claiming title by virtue of a grant made subsequent to the grant first mentioned, which grant had not been at the time of the decree in this case acted upon by the political department of the government of the United States.

In the view we take of this case, it is unnecessary to set out at length the master's findings with reference to this grant. He also found, however, the following facts, which are material to a proper understanding of the case. "(11) The original settlers at Chap-erito, their descendants, successors, and assigns, and those who have joined them, have occupied the lands set apart to them, cultivated the tillable parts and residing thereon, continuously and uninterruptedly, down to the present time. They have taken out acequias

from the river for the purpose of irrigating the lands and supplying water for domestic use. Some such acequias have been in use almost since the first settlement. It also appears by the evidence that the defendants, as part of and on behalf of such settlers, and as a committee appointed by them, have undertaken a more ambitious project in an agricultural way than any hitherto attempted in that community, and have had surveyed an acequia of large dimensions and considerable length, starting near Los Torres,—a settlement about two and one half miles above Chaperito,—on the river, and running on the south or southwest side of the river in a southeasterly direction a distance of about two and one half miles, to a point about one half mile west of the town of Chaperito. At this latter point the ditch divides into two branches, one branch running southwest a distance of two and one half miles, and the other running southeast a distance of about one mile; making the total length of the ditch and branches five or six miles. It was considerably more than half built at the time the temporary injunction was served in this case. One of the witnesses estimated the expense, in an ordinary way, of constructing the dam and the parts of the ditch already completed, at about six hundred dollars, and that the expense of fully completing it would possibly be a thousand dollars. The ditch, when completed, would be capable of carrying a body of water on an average six feet in width and two and one half feet in depth, and would take a large portion of the water from the river at ordinary stages. It would irrigate a thousand acres of land, possibly much more. The dam at the head of the ditch, for the purpose of turning the water into it from the river, was partly constructed when the injunction was served. It is built of boulders, rock, and brush, and reaches entirely across the river. It would, when completed, retain a large portion of the

water which usually flows down the river. The bottom lands on either side of the river and immediately adjacent thereto, where the dam is constructed, have been cultivated for many years by the settlers, and there are old acequias constructed, from which they are irrigated. (12) The land which the new ditch was designed to irrigate is situate between the forks or branches west of Chaperito. It is a kind of basin, with an arroyo running through the center, which can be irrigated from the branches on either side. It contains about eight hundred or a thousand acres. A portion had been laid off in lots, with appropriate marks to designate the boundaries of each subdivision, in order to be parceled out and occupied for agricultural purposes. It is new land, and has never been broken up or cultivated in crops. (13) The ditch has not been completed near the dam, but the course marked out for it runs near the river for some distance, until, after passing the narrows of the river below the dam, it bears off along the rising ground back from the river, until, reaching the higher level, it is carried down along the plains toward the Canon Aguilar, leaving a ridge of higher ground between it and the river. Little of the land along the river heretofore cultivated can be irrigated from the new ditch, but it was intended by the projectors to open up to cultivation and irrigation new land lying between the branches of the ditch. (14) The ditch, dam, and new land are all within the boundaries claimed for both the Antonio Ortiz grant and the Chaperito grant. The town of Chaperito is centrally located for the Ortiz grant, and is also central for the Chaperito grant; at least for the eastern and western boundary calls claimed by the answer. The following are the distances testified to of the points claimed to bound the Chaperito grant; the point of the Mesa Aguilar is a little south of west of Chaperito, and distant eight or nine miles; the point of the Mesa Los

Conchas is on the east, distant about nine miles; the possession of the Puerticito is about three miles south, and the mouth of the canon of the river about twelve miles to the north." And from these findings of fact the master reported, as his material conclusions of law, as follows: "This seems to be a case appropriately within the jurisdiction of an equity court; and the determination now will save expense and trouble to both parties hereafter,—save to the complainants the costs of a multitude of suits, and to the defendants the loss of labor and outlay incident to reducing the land to a state of cultivation. I am of the opinion that the complainants are entitled to the relief prayed for, in so far as it applies to the new land and the new ditch, outside of the old and cultivated land which might be irrigated by the first part of the ditch, if completed; that is, that the defendants should be perpetually enjoined from constructing the new ditch and dam for the purpose of irrigating and cultivating new land hitherto unoccupied and uncultivated under such ditch."

To the report of the special master both the complainants and the defendants file exceptions, the complainants' exceptions being as follows: * * *

"First. To the finding of the said master on page five (5) of his report, which is in the following words: 'The original settlers at Chaperito, their descendants, successors, and assigns, and those who have joined them cultivating the tillable parts and residing thereon continuously and uninterruptedly down to the present time,' which finding is contrary to the proofs, as the proofs go entirely to establish the fact that the original settlers at Chaperito, their descendants, successors, and assigns, and those who have joined them, have only occupied and cultivated a portion of the lands. There is no proof that the original settlers, their descendants, successors, and assigns, and those who have joined them, have cultivated the tillable parts of the land and

resided thereon continuously and uninterruptedly down to the present time.

“Second. To the finding of said master on page seven (7) of his report, among the conclusions of law, which is as follows: ‘On its face this grant at least is imperfect and inchoate, lacking several of the requisites decided by the courts as necessary to constitute a complete title,’—whereas he should have found that the said grant was void on its face.

“Third. To so much of the report of said master on page eleven (11) of his report as says: ‘Such certificates, when the boundaries are definitely defined and reasonable, the master is inclined to hold as color of title,’—whereas said grant being on its face void, and said certificates, being also void, do not and can not give any color of title to pieces of land pretended to be described in them.

“Fourth. To so much of the opinion of the said master on page fourteen (14) of his report as reads: ‘Outside of the old and cultivated lands which might be irrigated by the first part of the ditch, if completed; that is, that the defendants should be perpetually enjoined from constructing the new ditch and dam for the purpose of irrigating and cultivating new land hitherto unoccupied and uncultivated under such ditch,’—because it seems to reserve from the injunction the right to build any new ditch or dam on our land. If the present occupiers have acquired any right to the old cultivated lands and certain defined quantities of water which they have already appropriated, they have no right to appropriate to their own use any more of our water than they have already acquired a prescriptive right to use, or to construct any new ditch on our land for the purpose of carrying said water, or to erect any new dam across the river, to turn said water into any new acequia.’”

The defendants' exceptions, which appear to be unnecessarily voluminous, are as follows: * * *

"First exception: Respondents except to the 'third finding of facts' in said report, because it is not sustained by any evidence legally admissible in this cause.

"Second exception: Respondents except to the 'fifth finding of facts' in said report for the same reasons given in exception first, and for the further reasons that the statement that not exceeding one thousand acres was under cultivation below the town of Los Torres is based solely upon a statement made by the witness Jones, who admitted that he had not surveyed that part of the grant; that he had not passed over all that portion of the grant, or even seen all of it. His testimony on that point was irrelevant, was not based on actual knowledge of said witness, and should not be considered in this cause. That said 'fifth finding of facts' is erroneous and misleading for the reason that the testimony on the part of respondents shows conclusively that the waters of the said Gallinas river had been for more than ten years next preceding the commencement of this suit used exclusively, uninterruptedly, peaceably, and adversely to said complainants by said respondents and their coclaimants; and the further fact that the said complainants failed to produce any evidence that, from the point where the said river enters said Antonio Ortiz grant to the point below where the settlers on the Chaperito grant claim as their southern boundary, they, the said complainants, had ever used a single drop of water from the said Gallinas, from the inception of their supposed grant down to the time of the taking the testimony in this cause.

"Third exception: Respondents except to the 'eighth finding of facts' for the reason that, contrary to the provisions of rule 78 of rules of district court

(equity), said special master has copied into his said report a purported final decree of the 'departmental asamblea' as to the Chaperito grant, but said special master failed and omitted to embody into his report the petition of the settlers of the Chaperito, upon which action was taken by the departmental asamblea, all of which should have been inserted in said report, or else the whole omitted therefrom.

"Fourth exception: The said report is erroneous, and tends to mislead as to the true facts, especially in the 'ninth finding of facts.' In this the number of varas is given as held by different settlers upon said Chaperito grant, as evidenced by the 'certificates' of possession that were introduced in evidence by witnesses on the part of respondents; but there are omitted from said report the facts proven, that, at the point where the dam complained of was built, the land on both sides of the river had been in the possession of coclaimants with respondents, and held adversely to complainants for more than ten years next preceding the filing of said bill of complaint; and the further fact that some sixty families, whose names are given in said testimony, reside on the west side of the river Gallinas at and below the town of Los Torres, where said dam had been built, and within the boundaries of said Chaperito grant, all of whom cultivated lands of which they had held quiet, peaceable possession adversely to said complainants for more than ten years next preceding the filing of this bill of complaint in this cause, which lands are, and have for many years been, irrigated from the said Gallinas river; and that the ditch or acequia complained of passes for some two or three miles from said dam over and across the lands of said residents, who are claiming under the said Chaperito grant, and adversely to said complainants.

"Fifth exception: Respondents except to the said report, and especially to the 'tenth finding of

facts,' because it fails and omits to state that all the original papers under and by virtue of which claim was made by respondents and their coclaimants to the said Chaperito grant of land had been, in the year 1853, duly filed and recorded in the office of the clerk of the probate court and ex officio recorder of San Miguel county, where said tract of land is situated. Said report omits to state the date of the United States patent, under which claimants in their testimony now claim title, and it further fails and omits to state that the said United States patent had not been filed or recorded in the office of the recorder of San Miguel county until after it had been introduced in evidence in this cause; that no reference was made in complainants' bill of complaint that they had or relied upon any United States patent, but in said bill of complaint they distinctly and positively alleged as the basis of their title the purported original grant given by the governor of New Mexico to one Antonio Ortiz, and the act of confirmation by the congress of the United States of America on the third day of March, A. D. 1869; and that neither the original papers of said Ortiz grant, or any copies thereof, were filed with the said bill of complaint, nor any sufficient reason given for not doing so, as they are required by the provisions of section 1921 of the Compiled Laws of New Mexico (1884). Said report further omits to state that the description of the boundaries of the original grant to Antonio Ortiz grant, as first recited in said United States patent, is at utter variance and inconsistent with the boundaries as set forth and alleged in said bill of complaint, and as shown by the undisputed testimony of the witnesses on the part of respondents; that the western boundary of said Antonio Ortiz grant lies to the east of a line drawn north and south through said town of Chaperito; and that the boundaries of said original Antonio Ortiz

grant did not and does not include any of the land in dispute in this cause.

“Sixth exception: That the ‘thirteenth finding of facts’ is erroneous, and tends to mislead, for the reason that it fails to clearly state that the acequia complained of passes over and across cultivated lands (in the possession of those claiming under the Chaperito grant, and holding adversely to complainants) to a point opposite the said town of Chaperito; that at that point the river makes a very large bend to the east, then following again in a southwesterly direction; that across this bend there intervenes a hill, which terminates at the bend of the river below, where are situated the lands of some of the settlers claiming under the Chaperito grant, and whose certificates of possession are mentioned in said report, whose lands, as set forth in said report, are bounded on the east by the river, and la loma, or hill, on the west, which description would extend these lands westward across and beyond the lands in dispute in this cause, and whose western boundary would be a matter of fact to be ascertained and determined by a trial by jury, to wit, the lands of Gabriel Gallegos, Jesus Gonzales, and Jose Miguel Apodaca, to whose lands at the extreme southern point of said acequia the waters could and would be conducted from said Gallinas river, from which stream said last named parties, coclaimants with respondents, have used the water for irrigating said lands ever since the twenty-sixth day of March, A. D. 1846.”

Exceptions to conclusions of law made in said report of special master:

“One. The said special master, in his said report, misconstrues the legal effect of the pleadings in this cause. The bill of complaint does not allege title under a United States patent, but alleges title under the purported original grant to Antonio Ortiz, and the

act of confirmation by congress in 1869; but said complainants failed to file said original grant, or copies thereof, or to give a sufficient reason for failure to do so, as they are required to do by the provisions of section 1921, Compiled Laws of New Mexico (1884). That the defense of said respondents, as set forth in their answer filed in this cause, are the two statutes of limitation of this territory. (See sections 1880 and 1881 of Comp. Laws.) That under the allegations of said bill of complaint the right of action accrued to said complainants, or their assignors, against all the settlers of said Chaperito grant, or those claiming title thereunder, on the third day of March, A. D. 1869,—a period of nineteen years or more ago,—waiving the question of their right to have ejected them, at that time, or at any period after their first settlement in the year 1846. It is shown by the testimony that for more than ten years after the survey and issuance of the United States patent introduced in evidence, but not mentioned in said bill of complaint, said respondents and their coclaimants resided upon and remained in quiet, peaceable possession of said Chaperito grant of land, and claiming adversely to said complainants.

“Two. In said conclusions of law it does not appear that complainants have in any manner sustained the allegations of their bill of complaint. It was shown that the complainants were not entitled to the possession of the land where the said dam has been built; nor that they were entitled to the use of the waters of said Gallinas river below said dam. That no nuisance has been proven, nor any injury to the land; and all there is left of said bill of complaint, as shown by the recommendations of said report, is a threatened trespass by cultivation and improvement of a tract of land of uncertain boundaries, the possession and title of which are disputed between complainants and respondents and their coclaimants. Said recommen-

dations would substitute an injunction for an action of ejectment or trespass. It would take from respondents their constitutional right of a trial by jury. That by the language and terms of said conclusions of law, and the recommendation therein the order of injunction would be vague, uncertain, and consequently void. That, if any trespass is committed, as alleged in said bill is threatened as about to be committed, the said complainants have a plain, adequate, and complete remedy at law."

On September 22, 1890, the district court entered the following decree: " * * * It is ordered that each and all of the exceptions taken to said report in behalf of said respondents be, and the same are, all and several, sustained; that each and all the exceptions thereto taken by the complainants are all and several overruled; and, the court being of opinion that said complainants have a full and adequate remedy at law for the redress of the grievances alleged in their bill of complaint herein, it is further ordered that said bill of complaint be dismissed, with costs to respondents."

From this decree the complainants have appealed to this court, and have assigned seventeen specific grounds of error, the first of which is that the court erred in dismissing the bill of complaint; and it seems that the other sixteen assignments are mere elaborations of reasons in support of this assignment. It is proper to say, in limine, that there is no substantial conflict in the material facts in the case, and, if there were, the findings of the special master as to the facts of the case could not be disturbed in this court, there being in the record abundant evidence to support those findings. Two questions, however, are presented for the consideration of this court, which have received our most careful attention: The first question is, should the bill have been dismissed for the reason that the complainants

INJUNCTION:
multiplicity of
suits: jurisdiction:
equity.

below had an adequate remedy at law. The second question is, should the court below, if the first question be answered in the negative, have granted to the complainants any relief upon the case as presented by the pleadings and proofs in this record. The complainants alleged in their bill five grounds, which, if supported by proper evidence, entitled them to relief in a court of equity. These grounds were: (1) Title and possession in themselves to the Antonio Ortiz grant, or so much of it as is the subject of controversy here; (2) that the Gallinas river was a natural water course, flowing through the grant, essential to its enjoyment, and that the defendants were diverting the water thereof without right; (3) that the defendants were constructing a dam in the said river, which was a private nuisance to the complainants; (4) that the defendants were insolvent, and were trespassing upon their title and possession; and (5) that the acts of the defendants and their associates, unless prevented, would necessitate a multiplicity of suits. Where the right of the complainant is clear, and he is in possession of the land in controversy, equity will, in a proper case, protect that possession by injunction; and where the complainants' right to the use and enjoyment of water is obstructed, he may have an injunction without showing irreparable injury. *Mott v. Ewing*, 27 Pac. Rep. 194; *Conkling v. Improvement Co.*, 87 Cal. 296; 1 High, Inj., sec. 795, note 6, and cases cited; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Weiss v. Oregon Iron & Steel Co.*, 11 Pac. (Ore.) 255. Courts of equity have concurrent jurisdiction with courts of law in a case of private nuisance by diverting or obstructing an ancient water course, and may issue an injunction to prevent the interruption, though the complainant has not established his title at law. *Shields v. Arndt*, 4 N. J. Eq. 234; 1 High, Inj., sec. 14; *Wood, L. Nuis.*, sec. 785, note 2; *Carlisle v.*

Cooper, 21 N. J. Eq. 576; Pillsbury v. Moore, 44 Me. 154; Parke v. Kilham, 8 Cal. 78; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Ang. Water Courses, sec. 444, and cases cited. Insolvency of the defendants, who are threatening to commit repeated trespasses, has always been recognized as a sufficient reason for the interposition of equity by injunction (1 High, Inj., sec. 717, and cases cited; Id., sec. 727, and cases cited; 10 Am. & Eng. Encyclopedia of Law, 835, note 2; Id. 881, note 1); as is the prevention of a multiplicity of suits (1 High, Inj., sec. 717; 10 Am. & Eng. Encyclopedia of Law, 825).

It is unnecessary to decide, and we do not intend to be understood as deciding, that the evidence in this case clearly establishes the existence of all these grounds of equity; but, as will hereafter be shown, it is certainly conclusively established that the complainants are the owners of the tract of land known as the "Antonio Ortiz Grant," unless the defendants have acquired title to some portion of it by adverse possession. They have a confirmation of congress and the patent of the government. As against them, the defendants, so far as they rely upon an inchoate grant from Mexico, can have no standing in this court. Beard v. Federy, 3 Wall. 478; U. S. v. Stone, 2 Wall. 525; Ryan v. Carter, 93 U. S. 78; Tameling v. U. S. Emigration Co., Id. 644; Maxwell Land Grant Case, 121 U. S. 325; Id., 122 U. S. 365; 7 Sup. Ct. Rep. 1271; Chaves v. Whitney, 4 N. M. (Gil.) 611; Grant v. Jaramillo, 6 N. M. 313. It is also conclusively established that the Gallinas river is a natural water course running through the grant, essential to its enjoyment, and that the defendants at the time of the filing of the bill were diverting and attempting to divert the waters thereof, without, so far as the extension of their possession to the new lands and the water to irrigate them is concerned, any other

right than such as is derived under and by virtue of an inchoate and imperfect grant from Mexico. The fact that a new dam was being constructed is admitted, but the insolvency of the defendants is earnestly disputed. The proposition that a multiplicity of suits would result from the wrongful act of the defendants is obvious.

It is contended by the defendants that their constructive possession was coextensive with their so-called "Chaperito Grant." It is contended by the complainants that they were in the actual possession of the lands in controversy, and that, even if this were not so, their constructive possession is coextensive with the boundaries of the Antonio Ortiz grant. We may say here that we do not consider the effort of the defendants to dispute the boundaries of the Antonio Ortiz grant as worthy of notice. We think the evidence clearly established the boundaries of the grant, for the purposes of this case, at least to be substantially as alleged in the bill of complaint. The evidence does not satisfactorily establish the description of the various tracts of land of which the defendants and their associates were in possession at and prior to the institution of this suit; and in using the phrase, "the lands in controversy here," we should be understood as limiting this phrase to the "new lands," about which the witnesses have testified. While the insolvency of the defendants may not be established by an overwhelming preponderance of evidence, it does appear by satisfactory evidence, and, indeed, it is not denied, that it was the purpose of the defendants and their associates to establish a settlement of a great number of persons within the limits of this grant, and to parcel out to them specific portions of it; and it does not appear, nor can we believe, that it was the purpose of the defendants to require that the persons to whom such lands should be apportioned should be solvent and able to respond in damages to the complainants. When, in addition to this, we remember

that the statute of this territory attempts to give to each one of these persons a lien upon the lands of the complainants for any improvements erected by them under a title claimed to be derived from Mexico (Comp. Laws, 1884, sec. 2270), it is not difficult to determine that a court of equity ought to have jurisdiction to prevent by injunction such a wrong. The remedy at law by ejectment would be wholly inadequate, because, by the terms of the statute cited, the complainants might be compelled to pay large sums of money for improvements which would be wholly valueless to them. The objection of an adequate remedy at law, while untenable, came too late in this case, even though, if made at an earlier stage of the proceeding, it might have been entitled to some consideration. We do not wish to be understood as saying that, if presented at an earlier stage of the proceeding, it would or could have been sustained; on the contrary, we think the complainants had no adequate remedy at law; but, if they had, it was the duty of the defendants to have raised the question before answering. "Ordinarily, where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject-matter, the objection of the adequacy of the remedy at law should be taken at the earliest opportunity, and before the defendant enters upon a full defense." *Reynes v. Dumont*, 130 U. S. 354; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530. We think, indeed, that this bill might have been sustained upon the single equitable ground of the prevention of a multiplicity of suits, as a bill of peace. Properly understood, a bill of peace, as is said by Professor Pomeroy, is merely a part of the general jurisdiction of equity to prevent multiplicity of actions. 1 Pom. Eq. Jur., secs. 243, 275. In the note to *Woodward v. Seeley*, 50 Am. Dec. 449, it is said: "Bills of peace are of two kinds. To the first class belong those bills

brought to establish one general right between a single party on one side and a great number of persons on the other, where such right could not be determined by several suits between the different parties. To the second class belong bills brought between two parties to prevent further litigation of a right after it has been satisfactorily established by one or more trials at law.

* * * Bills of the first class require that a community of interest in the subject-matter of the controversy, or a common title from which all the separate claims which are at issue arise, should exist among the individuals composing the numerous body on the one side, or between each of them and their single adversary, in order to the exercise of the equity jurisdiction, where the bill is a strict, technical bill of peace." And among the illustrations cited are the following: "It is said that upon this principle bills have been maintained upon the part of the lord of the manor against his tenants to establish a right of free warren; or the right to inclose a part of a common; or by tenants or copyholders, or one of them suing for all, against the lord of the manor, to have a right of common established; or by the tenants against the lord of the manor to establish the right to the profits of a fair held for time out of mind in the manor; or by copyholders against their lord to be relieved of a certain general fine."

It is urged on behalf of defendants that courts of equity will never restrain a trespasser simply because he is a trespasser; nor at all, unless irreparable injury is shown. We think that this rule is subject to the

ADVERSE possession: remedy. qualification which we have endeavored to point out here, and that a court of equity has jurisdiction to grant the relief sought by this bill, or at least so much of the relief as will be hereinafter indicated. Having determined that it was error to dismiss the bill on the ground that complainants have an adequate remedy at law, it remains for us to decide

what relief should have been granted to the complainants by the court below. We are urged by counsel for complainants to remand the case with directions to the court below to grant the injunction as prayed for in the bill of complaint. This, we think, can not be done. While we think it clear that the court had jurisdiction of the cause, and should have rendered a decree in favor of the complainants, we by no means think that the complainants are entitled to all the relief claimed. It appears from the evidence in the record that at the time of the filing of the bill of complaint in this cause the defendants and their associates were in actual, open, notorious, and adverse possession of certain parts of the Antonio Ortiz grant; that they were actually cultivating portions of the lands, and had appropriated a portion of the water of Gallinas river for purposes of irrigation. We think, as to that portion of the grant, the remedy of the complainants at law by an action of ejectment is plain, speedy, and adequate, and that it is not the province of a court of equity, by a decree in a proceeding such as this, to attempt to disturb that possession. If the evidence satisfactorily showed what portions of the grant were thus possessed by the defendants and their associates, and what amount of water they had, prior to the institution of this suit, actually appropriated, it might be possible for this court to render a decree which would preserve the rights of all the parties; for, while it is clear that we would not enjoin the defendants and their associates from maintaining that possession and continuing to appropriate the water to the same extent to which they had previously appropriated it, it is equally clear that it is our duty to restrain them from carrying out what the master characterizes in his findings as "their more ambitious project in an agricultural way than any heretofore attempted in that community," from taking up new lands and appropriating additional water to irri-

gate them, at least until such time as they have challenged in a proper forum the title of the complainants under this patent, and have obtained a decision adverse to that title. We think the evidence shows that at the time of the filing of the bill of complaint the complainants had possession of these new lands; that the complainants had constructive possession of all of the land within the limits of this grant, save only such as was in the actual possession (*possessio pedis*) of the defendants and their associates; that the possession of the complainants was such as would have enabled the defendants and their associates to maintain ejectment if they had the better title, or, at all events, that the possession was in such condition that the complainants, being the owners, could obtain no adequate remedy in a court of law. The distinction which we seek to point out here is well and clearly drawn by the supreme court of the United States in the case of *Holland v. Challen*, 110 U. S. 15. We think the acts complained of, done by the defendants prior to the filing of the bill in this case, did not vest the defendants with possession. They were clearly intending to take possession of the new lands and parcel them out. In an action of ejectment by the complainants it would have been difficult, if not impossible, for them to prove that any particular person was in the possession of any particular portion of these new lands, and we think it was competent for them to appeal to a court of equity to restrain the defendants and their associates from taking forcible possession and parceling out these new lands, which, according to the proof, had never been cultivated prior to this time; and that they were not compelled to wait until the allotments had been made, and then bring ejectment against the several allottees. But it must be remembered that it is of the very essence of equity that a restraining order should be definite and certain in its terms; that it should point out to the defendants with

reasonable certainty the specific acts which they are required to refrain from doing; and we are, therefore, powerless in the present state of this record to remand this cause, with directions to restrain the defendants with such particularity and specification as equity and justice require.

Our conclusion, therefore, is that this case should be reversed and remanded to the court below, with instructions to that court to refer the cause to a master to take proof and report to the court what portions of the lands within the exterior boundaries of the Antonio Ortiz grant were in the actual possession of the defendants and their associates, and were actually possessed, cultivated, and occupied by them prior to the seventh day of February, 1888, and what proportion of the waters of the Gallinas river had been appropriated by the defendants and their associates for the purpose of irrigating the said lands and for their domestic purposes; that the defendants and their associates, upon the incoming of such report, should be enjoined and restrained from taking up any more land or appropriating any more water for the purposes of irrigating until such time as they had in a proper proceeding attacked and overcome the complainants' title; and that they be enjoined and restrained from constructing new dams and new ditches for the purpose of irrigating the land so possessed by them prior to the seventh day of February, 1888, but that they be not restrained from maintaining old dams and old ditches for that purpose.

FREEMAN, McFIE, and SEEDS, JJ., concur.

O'BRIEN, C. J., having heard the case below, took no part in this decision.

[No. 477. January 6, 1892.]

**EVA DALY, APPELLEE, v. HERMAN BERNSTEIN,
APPELLANT.**

CONTRACT FOR SALE OF LAND—ASSUMPSIT—RESCISSION.—On the rescission of a contract, under seal, for the sale of land, an action of assumpsit will lie to recover the purchase money paid under the contract, and the contract, though under seal, is admissible in evidence, in such action, to show what was paid upon it before its rescission, and when and how paid.

ID.—DEFECT OF TITLE—FAILURE OF VENDEE TO EXAMINE—RESCISSION—ESTOPPEL—FRAUDULENT REPRESENTATIONS OF VENDOR.—In such action, the vendee is not estopped from rescinding the contract, on the ground of a defect in the title to the land, by the fact of having failed to examine the records of title before closing the contract, where such an examination would not have disclosed the defect; and, under such circumstances, may rely upon the representations of the vendor or his agent.

ID.—FRAUDULENT REPRESENTATIONS — MERGER — DAMAGES.—Where, in such case, it was contended by defendant that the alleged fraudulent representations were merged in the contract, and that if there were any damages, by reason of the same, the plaintiff must assert his right to such damages in an action upon the contract, and not by an independent action like that pursued for the recovery of the purchase money, the contention was not well founded, the contract sued on being an executory contract to sell and to execute a warranty at a future day, and not a contract by deed executed with covenant of absolute warranty for breach of which an action might be maintained for damages.

ID.—RESCISSION—RENT—RULE IN STATU QUO.—Where, in such case, it was further contended by defendant that, though the representations made may have been false, plaintiff could not sustain the action, there having been no rescission of the contract as a matter of law, the plaintiff and vendee not having placed the vendor in statu quo, plaintiff being in default in the payment of part of the rent, and it appeared that at the time of the inception of the contract the defendant and vendor had merely the possession of the property, that the vendee on the rescission of the contract vacated the premises and returned or offered to return the keys to the vendor, and that the vendor had received and had the money of the vendee paid on the contract representing fully the rental value of the premises, under

such circumstances the vendee placed the vendor in statu quo by returning to him merely what had been received from him,—the possession of the premises; the title having been in the vendee, who, as the rightful owner, was alone entitled to the rental value.

ID.—TRUST DEED, ACCEPTANCE OF BY TRUSTEE—EVIDENCE.—Where it appeared in evidence, in such case, that at one time the title to the premises was in another, and such other person made a deed to the property, creating a trust providing for the trustee's acceptance by signing the deed, but he never signed it, the occupation of the premises so conveyed and the possession of the deed by the trustee were sufficient to show his acceptance.

ID.—TRUST DEED WITHOUT WORDS OF INHERITANCE—EVIDENCE—PRESUMPTION.—Where it further appeared from the deed in evidence, in such case, that it contained no words of inheritance, it did not convey a fee; and it will not be presumed, in the absence of any evidence to show that the creation of a fee was necessary to sustain the purposes of the trust, that such an estate was contemplated.

ID.—LOST DEED—ADMISSIBILITY OF PROOF OF CONTENTS.—Evidence of the contents of a deed alleged to have been lost is not admissible, where it is denied that such instrument ever existed, unless it be shown by the party offering such evidence that he has used the utmost diligence to find and produce the original; the very existence of the instrument itself being in question, ordinary diligence would not be sufficient.

ID.—FAILURE OF TITLE—CLAIM OF ADVERSE POSSESSION.—Where a person alleges title to land under a lost deed, which he fails to establish, he will not be permitted to set up a defense of adverse possession for a period sufficient to fix the title in himself.

ID.—TRIAL—INTERLINEATION OF INSTRUCTIONS.—Where, on the trial of a cause, instructions given are interlined, no error will be presumed where none is shown affirmatively, the statute forbidding such interlineations being directory merely, and not mandatory.

APPEAL, from a judgment in favor of plaintiff, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & BRUNER for appellant.

Where the burden of proof is on plaintiff, and his evidence is such that a verdict for him would be set

aside, the court should direct a verdict for defendant. *Randall v. B. & O. R'y Co.*, 109 U. S. 478; *Pence v. Langdon*, 99 U. S. 578; *Scofield v. Railroad Co.*, 114 Id. 615.

Recovery upon the common counts in assumpsit can not be had for money paid upon a special contract which has been in part performed, and the plaintiff has derived some benefit, and the parties will not be placed in statu quo. 1 Chitty, Pl. 355, and notes; Chitty on Contracts [6 Am. Ed.], 622, 741, 743, and notes; 5 East, 549; 1 New. Rep. 260; *Londregon v. Crowley*, 12 Conn. 563; *Miller v. Watson*, 4 Wend. 267; 7 East, 274; *Hudson v. Swift*, 20 Johns. 85; *Eams v. Savage*, 14 Mass. 425.

The alleged fraudulent representations of defendant were merged in the contract, and plaintiff was remitted to her remedy upon that contract. *Andrews v. St. Louis Smelting and Refining Co.*, 9 Sup. Ct. Rep. 646; *Farrar v. Churchill*, 10 Sup. Ct. Rep. 773.

A vendee can not rescind a contract of purchase of land, under which possession is given and partial payments made, without any eviction or disturbance of possession, while he is in default in his payments, and makes no offer or tender of payment of the balance of purchase money; and the time for performance of the contract by the vendor has not arrived, and he claims the ability and willingness to perform at the time and in the manner required by the contract. *Hudson v. Swift*, 20 Johns. 85; *Eames v. Dev. Germania*, 8 Brad. (Ill.) 663; *Sage v. Ranney*, 2 Wend. 532; *Johnson v. Evans*, 50 Am. Dec. 669, and note, and cases cited; *Bryant v. Isburgh*, 74 Id. 655, and note, and cases cited; *Gale v. Green*, 12 Id. 548; *Hynson v. Dunn*, 41 Id. 100; *Duncan v. Jeter*, 39 Id. 342.

Plaintiff did not pay or account for the use and occupancy of the premises, nor offer to do so before bringing suit. In order to rescind a contract it is neces-

sary to return or to offer to return, all benefits received under it, before a right of action accrues. *Guy v. Alter*, 102 U. S. 79; *Scott's Ex'r v. Barber's Ex'r*, 14 Ohio, 547; *Andrews v. Hensler*, 6 Wall. 255; *Underwood v. West*, 52 Ill. 397; 2 *Parsons on Contracts*, p. 679, and note.

The deed from Apodaca to Vow was for a valuable consideration recited as paid; and if it were admitted that defendant's sole title was derived under that deed, it was sufficient, by proper legal construction, to convey the fee, notwithstanding the omission of the technical word "heirs." *Young v. Bradley* 101 U. S. 782.

The court erred in refusing to admit testimony of the existence of the lost deed, and secondary evidence of its contents. *Stephens Dig. Law Ev.*, p. 136, note 2; *Stebbens v. Duncan*, 108 U. S. 32.

NEILL B. FIELD for appellee.

The bill of exceptions should be stricken out because not filed in time. *T., S. F. & N. R'y Co. v. Saxton*, 3 N. M. (Gil.) 443; *Evans v. Baggs*, 4 N. M. (Gil.) 67; *Jennison v. Boose*, Id. 71.

Assumpsit was the proper form of action. *Baston v. Clifford*, 68 Ill. 68; 1 *Chitty*, Pl. 355; *Martin v. Howil*, 3 Brev. (S. C.) 547; *Huckson v. Arant*, 2 Id. 264; *Stevens v. Lyford*, 7 N. H. 360; *Luey v. Bunday*, 9 Id. 298; *Richards v. Allen*, 17 Me.; *Doherty v. Dolan*, 65 Id. 87; *Keyes v. Harwood*, 2 C. D. 905; *Planche v. Colburn*, 8 Bing. 14; *Reddington v. Henry*, 48 N. H. 273.

The plaintiff had the right to rely upon the representations of Alexander as to the state of the title, and, if those representations were false, she had the right, so long as the contract remained executory, to rescind and recover the amount paid by her upon the faith of those representations. *Thomas v. People*, 113 Ill. 531.

Alexander's representations were false in law, having admitted he had never examined the record. *Fisher v. Mellen*, 103 Mass. 503; *Litchfield v. Hutchinson*, 117 Id. 195; 8 Am. and Eng. Encyclopedia, 801, note 8, and cases cited.

Where the grantee shows the grantor had no title, he is entitled to a return of any consideration paid for the land, without first showing that he has been evicted. *Johnson v. Powell*, 34 Tex. 528; *Morrow v. Reese*, 69 Pa. St. 373; 37 Tex. 674; *Thomas v. Coultas*, 76 Ill. 437.

A person bound by an executory contract to purchase land need not fulfill his contract if there is a cloud on the title. The defect need not consist of an outstanding title, which is necessarily a paramount title. *Estell v. Cole*, 62 Tex. 695; *Diggs v. Kirby*, 40 Ark. 420; *Taft v. Kessel*, 16 Wis. 292. See, also, *Lithbridge v. Kirkham*, 25 L. J. (N. S.) 2 B. 89; *Clove v. Moore*, 3 Jur. (U. S.) 48.

For cases where the purchaser of real estate may maintain an action to recover back money paid under the contract of purchase, where the contract has been rescinded, see *Baston v. Clifford*, 68 Ill. 68; *Bitzer v. Orban*, 88 Ill. 130.

The purchaser under an executory contract for the sale of land has the right to demand a perfect title. *Cooper v. Singleton*, 19 Tex. 260; *Rawle, Cov. for Title*, 41, 42, 565.

The children of Apodaca, who survive him, and the heirs of those dead, have an estate in the land in question, which constitutes a serious defect in defendant's title. 2 Wash. Real Prop. 538, et seq.; *Williams, Real Prop.*, 242, et seq.

No witness qualified to testify as to the contents of the instrument (if it were admitted that a proper foundation was laid) was produced by defendant. 2 Cowan & Hill's Notes to Phil. on Ev. 1214-1220; *McRey-*

nolds v. McCord, 6 Watts (Pa.), 288; McCreedy v. Navigation Co., 3 Whar. (Pa.) 424; Den v. Pond, 1 N. J. Law, 379; Kimball v. Morrill, 4 Me. 369; Jackson v. Frier, 16 Johns. 193.

There is no evidence tending to prove title by adverse possession, and if there was such evidence, it was properly excluded. 2 Perry on Trusts, sec. 863, 864.

The instructions fairly submitted the law of the case, and it devolves upon the appellant to point out wherein the court below erred in the instructions. Blaydes v. Adams, 45 Mo. App. 526; Fletcher v. Milburne Mfg. Co., Id. 321; Mo. Pac. R'y Co. v. Schoenen, 37 Id. 612; Symington v. Rohn, 23 Pac. Rep. 86; Dosenback v. Raymer, 22 Id. 787.

There is nothing in the record by which the verdict can be impeached, nor is there anything in the suggestion that the verdict was excessive. Proffat on Jury Trial, sec. 414; Haycock, Adm'r, v. Greup, 57 Pa. St. 438.

SEEDS, J.—This is an action in assumpsit upon the common counts simply, to recover the purchase money upon a contract under seal for the sale of land. The defendant pleaded the general issue. To prove her case, the plaintiff introduced evidence to the effect that the defendant, by his agent, had represented the title to the premises to be perfect, and that she had purchased relying upon such representations, but that, in truth and fact, such representations were fraudulent. She introduced a contract of sale to prove its terms, and the amount she had paid on the same. The defendant objected to this evidence, upon the ground that the contract was sealed, and, as this was an action in assumpsit, it could not be received as evidence, as it could only be material and relevant in an action of covenant. (1) The plaintiff claimed that the contract

was rescinded because of the false representations as to the title. In proving that the title was bad, the plaintiff introduced a "trust deed," so-called, from one Apodaca to Julian Vow, through whom the title devolved upon the defendant, which trust deed passed the title to Vow for specific purposes solely, not in any sense requiring that he should possess the fee. And she contends that when the trust deed was executed, all right and interest to the land passed again to Apodaca, and that Vow had no interest in the property which he could pass to the grantors of the defendant. That at Apodaca's death the property went to his heirs, and that, as the defendant did not possess the interests of all those heirs, his title was not good, as he had represented. The record, in the recorder's office of Bernalillo county would have shown this title to be imperfect. The defendant contended that the plaintiff could have consulted, and that it was her duty to so have done, the records of the county recorder, and that she would there have found that the title was imperfect, and, as she has failed so to do, she can not now complain. (2) That the title was good under the so-called "trust deed," as it in law passed to Vow a fee. That, at least, there was afterward a good warranty deed given to Vow by Apodaca and wife to cure any defects which might have been in Vow's title, but that that deed was lost. The court heard evidence upon the loss of this alleged deed, and of the diligence used in searching for it, and upon its execution, and thereupon refused to allow evidence of its contents to be given. (3) That the man Vow had title to the land in controversy by adverse possession. The court refused to allow evidence of this claim to be given. (4) Then, under the contract for sale of the property in controversy, the defendant was under no legal obligation to make a good title until the last payment by the plaintiff, and that, as that time had not come,

the plaintiff could not rescind the contract; at least, not until she had placed the defendant in statu quo, and was not in default herself under any of the requirements of the contract. That she was in default in the payment of one or two installments under the contract, and that she had not offered to pay the defendant for the fourteen months use of the place when she attempted to rescind the contract; therefore he had not been placed in statu quo. There was a trial to a jury. Instructions given and refused. Some of the instructions asked to be given by the defendant were interlined by the court before they were given. Verdict for the plaintiff. Motion for a new trial, which was overruled. Judgment upon verdict for plaintiff, and the defendant appeals.

The defendant makes forty assignments of error, but it is unnecessary, for a proper decision of this case, to consider all of them. We will consider only those which it seems to us fairly and correctly meet all the questions raised by the record.

1. It is insisted that, as this is an action in *assumpsit*, the contract for the sale of the land ought not to have been admitted in evidence, as it was under seal. This proposition would hold good if the contract had been introduced for the purpose of recovering under the terms of that instrument and for the breach of its covenants. Then the action should have been by covenant. Chit. Pl. 115; 4 Am. & Eng. Encyclopedia of Law, 464. But it is contended in this case that the contract was rescinded. It is upon this theory that the plaintiff has proceeded. If this theory is correct, then plainly, as the defendant has received from the plaintiff money upon a contract which has now no existence, and as she has received no equivalent for her property, she is entitled to have it refunded. She certainly can not recover it under any of the terms of the land contract, for under her theory there is no such contract.

Under such circumstances, where one becomes possessed of another's money by force of the terms of a contract which have failed, he holds the money for the use of that person, and, upon failing to redeliver it, may be made to respond in damages by the action of *assumpsit*. 7 Lawson, Rights, Rem. & Pr., sec. 3691; 1 Chit. Pl. 155. It was, then, clearly proper to admit the contract in evidence under this form of action, to prove how, when, and what amount had been paid upon it before it was rescinded.

2. It is insisted that, if there were any fraudulent representations, this plaintiff can not take advantage of them to rescind the contract, for she had the opportunity to ascertain their character at hand, and, if she failed to avail herself of that opportunity, she can not complain. Her testimony was to the effect that the agent of this defendant—who was the active person in the whole transaction—represented to her that the title to the land was perfect in the defendant, Bernstein, and went back without a flaw to a legal Spanish grant; that she relied upon these representations, and purchased accordingly; that in fact the title was not perfect; and that the defendant had no title to the land. The agent testified that he did represent the title as good, but told the plaintiff that she should go to the records in the recorder's office and see for herself. This she did not do, though she lived in the town where the records were, and had she done so she would have found the defect in the title which was complained of. The agent had never looked at the record title, and did not know what was its character. As to whether there were representations, whether they were false or not, and whether this plaintiff relied upon them solely in entering into this contract, were questions for the jury, under proper instructions from the court. Now, under the first instruction given by the court, the jury were told that, if they found that the

CONTRACT for
sale of land:
rescission.

facts were as above stated, they should find the issues for the plaintiff. To this the defendant excepts, alleging that the plaintiff was not authorized to rely upon such oral statements. As we understand the objection, it is that, as she had the opportunity to search the records herself, she should not have relied upon the defendant's representations. If the representations made by the agent were as to material facts, and were not matters of opinion merely, and were not true, even though he may have thought them so, and he made them to the plaintiff with the intention that she should believe them, and upon such belief should purchase the property, and she did rely upon them, and did so purchase the property, then clearly she is legally entitled to rescind the contract so long as it is executory, at least, and sue for the purchase money paid by her, unless she has forfeited that right by failing to first consult the records herself. 5 Lawson, Rights, Rem. & Pr., secs. 2342, 2352, and notes; 8 Am. & Eng. Encyclopedia of Law, 841, and note 8. The general principle of law in reference to fraudulent representations made in purchasing property is that if the truth can be ascertained by the purchaser by the use of ordinary diligence, and he fails to avail himself of the results of such diligence, then the false representations are not actionable. 8 Am. & Eng. Encyclopedia of Law, 803; Hamlock v. Fairbanks, 46 Wis. 415.

The contention on the part of the defendant is that under this rule of law the plaintiff is estopped from saying that she was misled by the false representations of the agent. The records were near at hand. She had the ability and the right to consult them. If she had done so, she would have found that the title was not good as shown by the records. It is, however, apparent that the law which should govern in this case must be general. The question is: Does a record of title provided for by the

DEFECT of title:
failure of vendee
to examine:
rescission:
estoppel.

government furnish such knowledge of the actual state of the title as to make it incumbent upon all purchasers to consult that source of knowledge before purchasing, or to suffer from so failing should the title prove defective, although the vendor represented the title to be good? In other words, is the presence of a record title kept by the government so potent as a notice as to relieve the vendor from the need of making representations, and are those representations valueless if made? To that position must this contention come. Now, the fact is that a government record is not necessarily true. In this very case, if the claim of the defendant in regard to the lost deed is true, then the record in the recorder's office is not true, for the alleged lost deed is not of record, and, even though the plaintiff had sought out the record, she would either have had to throw up the bargain, or to rely upon the representations of the defendant as to the actual title. As a matter of fact, the record title kept by the government has but one purpose,—to protect innocent purchasers who may buy with simply the knowledge of the record, either actual or constructive. Such a record does not have for its purpose the protection of a vendor who may fraudulently sell the property to a party, even though that party might have found by the record that the title was imperfect. We do not think it was ever intended to prevent vendors from stating the actual fact, or assuming to, and allowing the vendee to rely upon those representations. If the record in this case did not state the fact as to the title, why should not the plaintiff rely upon the representations of the defendant, and if they are false, and she, relying upon them, and they being material, is injured, why ought she not to have her damages? If the record is not true, and does not pretend to be absolutely, why should a person seek out that for information which can not give them the facts as truly as the one claiming the

title? It seems to us that by no ordinary diligence which the plaintiff was in law called upon to use could she have found out the actual truth as to the title, and that she might legally then have relied upon the representations of the defendant. The instruction given, therefore, was correct.

There is a proposition urged by the defendant under this head which should be adverted to. It is that the alleged fraudulent statements were merged in the contract, and, if there were any damages by reason of the same, then it must be asserted in an action upon the contract, and not in an independent action like the one before us. As sustaining this contention, he cites *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, and *Farrar v. Churchill*, 135 U. S. 609. The last case cites approvingly the first one. If this position is sound, then, without question, the lower court erred in sustaining this action in *assumpsit*. However, the principles enunciated in those two cases must be understood, as in every case, as referring to the facts in issue. In the case of *Andrus v. St. Louis Smelting Co.*, the defendants had sold a lot in Leadville, Colorado, to the plaintiff and given him a deed of conveyance containing covenants that it was seized of an estate in fee simple; that they were clear of all liens and incumbrances; and that it would warrant and defend the grantee in their peaceable possession. Upon such a conveyance the court said: "The covenant in the deed for quiet possession merged all previous representations as to the possession, and limited the liability growing out of them. * * * The covenant was an affirmance of those statements in a form admitting of no misunderstanding. * * * But where the vendor executes a conveyance to the purchaser, with a warranty of title and covenant for peaceable possession, his previous representations as to the validity of his title, or the

FRAUDULENT
representations:
merger:
damages.

right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant, which determine the extent of his liability." Pages 647-649, 130 U. S. In the case of *Farrar v. Churchill*, supra, this last case was approved, and it was said that the contract had ceased to be executory, and hence, even for fraud, could not be lightly brushed aside. In each of these cases the actions were for damages for fraudulent representations. As distinguishing these cases from the one before us, it is noticeable that the contract in each was an absolute warranty deed and executed. The contract in this case was to sell and to execute a warranty deed in the future. It was an executory contract. What covenant was there in it upon which this plaintiff could sue for false representations, as being merged in it? Was it the covenant to sell? Had he not sold? Did not he give possession? If, then, he had falsely represented the title, how can it be said that the plaintiff could have recovered damages under this covenant which was executed and not broken? There is but one other covenant, and that is where he agrees to execute and deliver a warranty deed. Has he not fulfilled this covenant when he makes such a deed and delivers it? Then while the warranty in that deed, when made, might be the basis for an action if the title was bad, and all false representations might be merged in that, surely this plaintiff is not bound to go on paying money upon a contract which she was induced to enter into by fraud, until she could demand a warranty deed, and only then recover upon the covenant in the new contract. If the cases cited are in point, then some covenant in the contract before us must be cited into which the false representations are merged, and by reason of which that covenant is or will be broken. There is none, for this is an executory contract. The covenants

in it could all be fulfilled, though the title had been falsely represented to be good.

3. It is further contended by the defendant that, even though there may have been false representations, RESCISSION: rent:
rule in statu quo. that the plaintiff could not sustain this action, for there had been no rescinding of the contract as a matter of law, as the plaintiff had not placed the vendor in statu quo, and she was herself in default in the payment of some of the installments upon the contract. It is the general rule that contracts may be rescinded when the entering into them has been induced by fraudulent representations as to material facts actually relied upon and inducing the contract, when the parties can be placed in statu quo. 3 Am. & Eng. Encyclopedia of Law, 929. Also: "It is well settled that a purchaser under an executory contract calling for a good title will not be required to complete the purchase if the title fails. * * * As a general rule, a party rescinding a contract must restore what he acquired under it. He must place the other party in statu quo; and this seems to be a condition precedent to the right to maintain an action founded upon such rescission." Taft v. Kessel, 16 Wis: 291, 296.

The evidence in this case shows that the plaintiff delivered, or offered to deliver, the keys of the premises to the defendant, and vacated the place. It is contended, however, that the other party, here the defendant, should have been paid the rental value of the place for the time that the plaintiff occupied it, and that he was not in statu quo until this was done. This raises a nice question. "In statu quo" means being placed in the same position in which a party was at the time of the inception of the contract which is sought to be rescinded. Now, at that time the defendant had merely the possession of the place. If the jury believed the testimony, that was delivered to him, and hence

he was in statu quo. It will be contended, however, that what he really possessed at the time of the contract was the possession of the premises, and the possibility of the rental value for the time which the plaintiff held it, and that the latter has not been returned. On the other hand, he has been in possession of the money of the plaintiff, which represents fully that rental value. If that value belongs to the defendant he has it, and he could have pleaded a set-off and recovered it. As a matter of fact, the court instructed the jury to allow for the same; and if this was a proper instruction, as there was no set-off pleaded, that instruction must have been predicated upon the ground that in law the rental value was tendered and paid in the purchase money. Why should the plaintiff be called upon, before suing for what has wrongfully been taken from her, to pay over to the party who has deceived her yet more money as a condition precedent, when the law gives the vendor the right to plead a set-off and recover what is due him from the moneys actually in his hands? Supposing the defendant financially worthless, the practical operation of the contention here would be, to use a general principle of law, to enlarge the gains of one whose wrong has already deprived the vendee of her money. It may be said that the plaintiff would have a lien for the money upon the land in question. But that is the fatal error in the defendant's case—the title is not in the defendant. Upon that allegation the case rests, and the plaintiff gains her case only by substantiating it. If, then, the title is not in the defendant, then has he any right to the rental value? Is not the plaintiff holden to the rightful owner of the fee for that rental value? If she is, then certainly she has placed the defendant in statu quo when she gives him what she received from him—the bare possession. We do not wish to be understood as holding that as a legal proposition, good in all cases, upon failure of title in a con-

tract for sale of land, the vendor is placed in statu quo by the simple return of the possession of the land, but only that, under the peculiar circumstances of this case, that was all that was required. While a party must not be in default himself when he seeks to rescind a contract, yet in this case it would have been absurd for the plaintiff to have paid further installments upon a contract which she knew was guarantying her no protection, especially as there was an attempt on the part of the defendant to correct the defect in the title before she rescinded the contract, and there is no showing that the default was not caused by the plaintiff waiting to see if this defendant could correct the title. It is not, however, the invariable rule that the vendee should place the vendor in statu quo before bringing an action for the purchase money. But it is held that a contract may be rescinded for fraudulent representations of the vendor's title, or where it is necessary for the protection and indemnity of the vendee, and the action may be brought for the money paid before restoring possession. *Taft v. Kessel*, 16 Wis. 291, 297. The principle therein enunciated applies in this case.

4. It is further contended that the plaintiff has not proven that the title was bad. The evidence goes to show that at one time the title was in one Apodaca. He made a deed of trust, so-called, to his son-in-law, Julian Vow. The deed declares that "whereas, the said Juan Apodaca and wife are desirous that their said grandchildren should enjoy the proceeds, rent, issues, and income of the real estate," he grants the same to Vow for that purpose. Vow was to pay the expenses of the premises out of the above issues also. There were no terms of inheritance, such as heirs, used in the deed. There was provision made for the said Vow to accept the trust by signing the deed. This he never did.

TRUST deed, acceptance of by trustee: evidence.

But he occupied the place, and by the testimony of his own son, one of the defendant's witnesses, he had the deed in his possession. We think that this was sufficient to show that he accepted the trust without his signing the deed, and that he held under the deed, in absence of any other testimony as to a conveyance giving him a paramount claim to the fee. It is through this deed that the defendant's title is to be traced; he having the deed founded upon one from Julian Vow and wife. Did this trust deed pass the fee to Julian Vow? This is the contention of the defendant, and he bases that claim upon the law of the case of *Young v. Bradley*, 101 U. S. 782. In that case a devise was made to certain trustees and their successors to carry out the provisions of a will. A sale was made of some of the property by the trustees. After that, parties who were beneficially interested under the will should have entered into its full enjoyment. The devisee sued for the land thus sold, and the defendant insisted that, the legal title being in the trustee, he had a right to sell the property. The court decided otherwise. We think that the case fails to sustain the point contended for. The court quotes approvingly from *Perry on Trusts*: "(1) Whenever a trust is created, a legal estate sufficient for the purpose of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not. (2) Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires." *Perry, Trusts*, sec. 312. Again he says: "The general rule is that, whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate to the execution of the trust, and no more or less." Section 320. To the same effect,

2 Washb. Real Prop. *186, *187. While, then, if the intention had been to pass a fee if it had been necessary to sustain the trust in Vow, such an estate would have passed without the word "heirs" or its equivalent; yet where such an estate is not required, and where the absence of words of inheritance would raise a presumption that no such an estate was contemplated, we can not presume one to protect parties who are claiming under the larger estate. It may be urged that it was possible for the execution of the trust that a fee might have been required, for Vow might have died before the children had grown to manhood. However, the presumption would certainly be the other way, and it was incumbent upon the defendant to show that a fee was necessary. This he failed to do. We think that Julian Vow had no fee in the estate which he could convey, and that, therefore, the title claimed through him was clearly bad.

TRUST deed without words of inheritance: evidence: presumption.

5. Fearing that his title would not sustain his claim, the defendant alleged that there was a subsequent deed from Apodaca and wife to Vow for this property, which was a straight warranty deed. That Vow had the deed, but it had been lost, and after search it could not be found. He introduced testimony of the loss, and then sought to introduce oral proof of the contents of the instrument. This the court refused to allow, upon the ground that the evidence was not sufficient to prove the loss, and that its execution was not proven. "Before defendant should be permitted to give secondary evidence of its contents, it should prove that it had exercised the utmost diligence to procure the original." *Wiseman v. Northern Pacific Railway Co.*, 26 Pac. Rep. (Ore.) 272. The question as to whether the loss of the instrument has been sufficiently proved to admit secondary evidence is to be determined by the court.

LOST deed: admissibility of proof of contents.

1 Greenl. Ev., sec. 558. This same author, in the section last quoted, lays it down that the diligence shown in the search must depend upon varying circumstances. We think that when the very existence of the instrument is denied, and the law, in the first place, requires the instrument to be in writing, the diligence shown ought to be of the highest character, before secondary evidence of the contents of the lost instrument should be allowed. The danger of the introduction of manufactured evidence is extremely great in such a case, and hence the party seeking to build up a defense upon such an instrument as in this case must use the utmost diligence. We have read carefully and often the evidence in this case, and are impressed with the idea that the defendant has failed to show such diligence as the law requires.

6. The defendant endeavored to set up the defense of adverse possession in the man Vow for a period long enough to anchor the title in himself. FAILURE of title:
claim of adverse
possession. This the court refused to allow to be proved, and we think rightly. While inconsistent defenses are allowable under certain circumstances, we think it neither just nor proper to base a claim upon a paper title, insisting in good faith, as we presume in this case it was done, that that gives him his rights, and then, for fear it may fail, endeavor to come in upon an adverse claim. If he took under the trust deed (and he had it in his possession), he could not claim adversely to it; and hence all testimony looking to an adverse title in contradiction of that deed was rightfully rejected. If he had another title—a warranty deed—certainly he could not nor would not claim adverse to that; and all evidence as to his claiming the premises as his own would apply to one or the other of those two paper titles, and it would be presumed to have one or the other of them for its founda-

tion, and hence that evidence would be immaterial, as the paper title would be the better evidence.

7. Finally, it is urged that there was error in the court's interlining certain of the instructions asked by the defense, and given as interlined. The INTERLINEATION of instructions. statute forbids such interlineations, or erasures. But the statute is only directory, not mandatory, and no error will be presumed where none is shown affirmatively. *Denver & R. G. Railway Co. v. Harris*, 3 N. M. 109. The instructions fairly cover the points in issue, and meet the requirements of the case. After attentively studying the record, and the law as applicable to the questions raised upon it, we fail to find any error requiring us to reverse the case; hence the judgment of the lower court is affirmed.

O'BRIEN, C. J., and FREEMAN and McFIE, JJ., concur. LEE, J., who tried the case below, took no part in it in this court.

[No. 480. January 6, 1892.]

NATHANIEL BELL, APPELLANT, V. WILLIAM SKILLICORN ET AL., APPELLEES.

MINING CLAIM—POSSESSION—TITLE—EVIDENCE.—An open, visible, and actual possession of land by a person claiming to be the owner is prima facie evidence of title in the person so possessed. By "prima facie" is meant evidence sufficient to establish title until a better title is shown.

ID.—PATENT—EJECTMENT—INSTRUCTIONS.—In an action of ejectment for the recovery of a mining claim, under section 1570, Compiled Laws, held by plaintiff under a patent from the United States, which was admitted in evidence, an instruction of the court that, if plaintiff's vein was within lines formed by artificial monuments which were placed around it at the time of the survey for patent, it would make no difference whether the monuments and survey were properly connected with the surveys of the public lands, that the location of the monuments would determine and control the location of the vein, was a proper instruction, and settled the description of the land in the patent to be the locus in quo of the land in controversy.

ID.—ADJOINING OWNERS—BURDEN OF PROOF.—In such case, where it appeared defendants had entered into the land included within the side lines of the patent, and taken large quantities of ore therefrom, and their defense was that, as owners of an adjoining claim, they had followed a lode, on its dip, the apex of which was within their claim, within the side lines of plaintiff's claim extended downward vertically as, they claimed, they were authorized in such case by act of congress—Held: Plaintiff having established a *prima facie* case when the defendants undertook to show that, by a certain act of congress, they were given the right to follow a lode from the sides of their claim on to the plaintiff's, and take ore therefrom, the burden of proof as to the existence of such facts as are contemplated by that act, and of their compliance with its provisions, shifted, and was upon them.

APPEAL, from a judgment in favor of defendants, from the Third Judicial District Court, Grant County. Judgment reversed, and new trial ordered.

The facts are stated in the opinion of the court.

H. L. PICKETT and CATRON, KNAEBEL & CLANCY for appellant.

JOHN D. BAIL, S. B. NEWCOMB, and FIELDER BROS. & HEFIN for appellees.

LEE, J.—This is an action in ejectment, brought by plaintiff Bell, against Skillicorn and Snyder, defendants, for the possession of a mine called the "South Extension of the Pacific Lode," particularly described in the declaration, and for \$25,000 damages, etc. The defendants pleaded not guilty. The cause was tried by a jury at the August term, 1890, and a verdict of not guilty rendered. A motion for a new trial was made and overruled, and an appeal taken. The pleadings, record, evidence, objections, and exceptions taken to the rulings of the court and motion for new trial are all included in the record in proper bills of exception, as far as required. On the trial the plaintiff, to establish his cause, introduced a patent from the United States to James Edgar Griggs' minor

heirs, proper conveyances from Griggs' heirs to the plaintiff, also identified the surface of the ground in question with that set out in the patent, and also that defendants had entered into the land included within the side lines of the patent and had taken a large quantity of ore therefrom, amounting to \$3,612 net. This proof stands uncontradicted. Defendants, not denying that they had entered into the land included within the plaintiff's side lines extended down vertically, claimed that they had entered upon the same by following another lode, on its dip, the apex of which lay outside of the plaintiff's side lines, and that they (defendants) had entered upon the said claim within the side lines of plaintiff extended downward vertically, by following said other lode, whose apex lies outside of plaintiff's side lines, and claimed that their lode cut off and took the place of plaintiff's lode, or rather that plaintiff's lode ceased to exist, and that defendants' lode only continued thereafter downward. The evidence upon this proposition was all conflicting.

Counsel for appellees in their brief contend that it is not true that the proof stands uncontradicted as to the identity of the surface ground claimed by plaintiff with that set out in the patent to the Griggs heirs, from whom plaintiff derails title; and that, while they (appellees) have followed their said vein, which has its apex within the exterior boundaries of their location on its dip beyond their western side line, drawn down vertically (as they had the right to do), they deny that they entered into or through the side lines, extended down vertically, of any land described in plaintiff's patent, or of any land upon which the plaintiff or his grantors ever had any valid location. Even if that is so, it would be contracting the issues to a much narrower limit than would be justified by the pleadings or contemplated by the statute under which

the suit was brought. Section 1570 of the Compiled Laws provides: "An action of ejectment will lie for the recovery of the possession of a mining claim, as well also of any real estate, where the party suing has been wrongfully ousted from the possession thereof, and the possession wrongfully detained." The pos-

MINING claim:
possession:
title: evidence.

session by the plaintiff of the land in question is admitted by the defendants.

In their argument in their brief they say:

"The plaintiff's and defendants' mines lie side by side, and close to each other, and they have been working their respective mines for several years last past. Each party was well acquainted with the workings of both mines, and had free access to them. Bell had known for a long time that the defendants were working on what they claimed to be their own vein, and within the side lines of his mine as claimed by him." Open, visible, and actual possession and occupation of real estate by a person claiming to be the owner is prima facie evidence of title in the person so in possession. The words "prima facie" mean evidence sufficient to establish title unless some person shows a better title. *Barger v. Hobbs*, 67 Ill. 592. The admission is full to the effect of the possession and occupation by the plaintiff, and therefore we think the statement of fact as given is correct.

It is also contended by the defendants in error that the plaintiff's claim, as described in the patent, in its call for connection with the public lands would, if so surveyed, throw the plaintiff's location in another place, and the defendants would not, if located in accordance therewith, be guilty of having entered upon

PATENT: eject-
ment: instruc-
tions.

the same. The rule in determining the exact locality of a tract or boundary of land is that recourse must first be had to

natural objects; second, to artificial marks; and, third, to course and distance. The court admitted the patent

in evidence, and followed the rule strictly in an instruction to the jury in regard to it, as follows: "If plaintiff's vein is within side lines formed by artificial monuments which were placed around the same at the time of the survey thereof for patent, it would make no difference whether said monuments and survey were properly connected with the surveys of the public lands, but the locations of the said monuments would determine and control the location of said vein or lode." This instruction states the law correctly, and, as admitted, seems to settle the description of the land in the patent to be the locus in quo of the land in question.

Amongst the various errors assigned by the appellant one is that the court erred in instructing the jury that the burden of proof in the trial below was upon the plaintiff. The instruction in this connection is as follows: "The defendants plead 'not guilty,' and this plea in effect denies the plaintiff's cause of action, and puts the plaintiff upon proof of all the material allegations of his declaration, and the burden of proof is upon the plaintiff to maintain his case by preponderance of the evidence. You should consider all the evidence in the case that you believe to be true in determining whether the plaintiff has a preponderance of the evidence, and if, after having considered all the evidence in the case that you believe to be true, you are not satisfied that the plaintiff has proven the material allegations of his declaration by a preponderance of the evidence, or if you believe from the evidence that a preponderance is with the defendants, you should find for the defendants." This instruction upon the issues formed by the pleadings states the law correctly in saying "the burden of proof is upon the plaintiff;" but the question arises whether, from the evidence, the burden was not shifted from the plaintiff

ADJOINING OWN-
ERS: burden of
proof.

to the defendants, and the jury should have been so instructed. The distinction concerning the burden of proof seems, according to some of the law writers, a little obscure. 2 Thomp. Trials, p. 1319, says: "Many judges seem to use the term as a sort of jargon, without any definite conception of its real meaning. Those who have some definite conception of its meaning are unfortunately divided in opinion upon the two following propositions: The first is that, so long as the evidence is directed to a single issue, or, more properly speaking, to a single proposition of fact, the burden of proof never shifts, no matter how little evidence is adduced by the party sustaining the burden, or how much is adduced by the opposing party. The other is that, although the evidence may be directed to the same issue or proposition of fact, yet when the party who in the beginning sustains the burden in respect of such issue or proposition of fact introduces such evidence as, if believed, makes out what is frequently called a 'prima facie case,'—that is, shows that the proposition which he affirms is true—the burden of proof shifts upon the other party to rebut or to avoid the so-called 'prima facie case' thus made." Mr. Thompson appears to hold to the former view to the exclusion of the latter. At the risk of being classed by the learned author with those that utter jargon, we believe the first proposition to be true, and that the latter one is not inconsistent with it, and in a given case may be equally true. The case of *Powers v. Russell*, 13 Pick. 76, in the opinion by Chief Justice SHAW, has long been regarded a leading case and standard of authority upon the question. We fully adopt his views, and, as it is the principal case to which Judge Thompson refers to support the position taken by him, we quote an extract therefrom: "It may be useful to say a word upon the subject of the burden of proof. It was stated here that the plaintiff had made out a prima

facie case, and therefore the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he would prevail. Therefore, the other party, if he would avoid the effect of such prima facie case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue or proposition of fact, and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition or fact, proposes to show another and distinct proposition, which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." The views of Judge SHAW were followed by Judge PHILLIPS, a judge of eminent ability, while sitting in the place of Justice BREWER during the time that distinguished justice was on the circuit bench. The case is very similar to the one under consideration, and should be regarded as high authority. In the opinion the judge says: "Error is assigned to the action of the court in allowing defendants' counsel to open and close the argument to the jury. To properly understand this action of the court a brief reference to the state of the pleadings is necessary. Owing to the particular character of the averments of the petition as to the jurisdiction and the grounds of defendants' claim, a question of law arose at the outset as to whether or not the plaintiffs should not go so far in their proofs as to maintain these allegations. But the court became satisfied that the

question of jurisdiction had practically been eliminated by the action of Judge BREWER in striking this issue from the answer, and later, on a careful reading of the answer, satisfied the court that it in effect admitted plaintiffs' title to the surface location of the Battle Mountain and Little Chicago claims, and directly admitted the invasion of the side lines of the plaintiffs' claim. Under the issues as they really stood the only burden that the law imposed upon plaintiffs was the mere formal introduction of the patent in evidence, and proof of the quantity and value of the ore taken. As it was not to the interest of defendant to disprove the presence of valuable ore at this point, the evidence on the issue was brief, and merely as to value. If, forsooth, the plaintiffs saw fit to extend this mere formal inquiry over a wider field, it was not demanded by the pleadings or by the court. It is manifest from the trial, the charge of the court, and this motion for a new trial, that the real burden rested, and heavily, on the defendants. They held the laboring oar throughout on all vital issues in question. From them the burden of the real issue never shifted. Under such a peculiar condition of the trial I felt that common fairness demanded that defendants' counsel should open and close the argument. This view of the real equity of the rule in question I have long entertained. I fought for it while at the bar, and shall endeavor to impartially maintain it, as one founded in justice and equity, while I remain on the bench." *Cheesman et al. v. Hart et al.*, 42 Fed. Rep. 98.

Many other cases might be cited in support of the proposition as laid down by the learned judge. But the supreme court of the United States has authoritatively settled it as a question of practice for us, and we need not look further, unless that court should see fit to change their ruling upon it. In *Greenleaf's Lessee v. Birth*, 6 Pet. 302, that court say: "In the present

case the plaintiff has shown *prima facie* a good title to recover. The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up a title in third persons, with whom he has no privity. In such a case it is incumbent upon the party setting up the defense to establish the existence of such an outstanding title beyond controversy. It is not sufficient for him to show that there may possibly be such a title. If he leaves it in doubt, that is enough for the plaintiff. He has a right to stand upon his *prima facie* good title, and he is not bound to furnish any evidence to assist the defense. It is not incumbent on him negatively to establish the nonexistence of such an outstanding title; it is the duty of the defendant to make its existence certain." This terse and emphatic language leaves no room for conjecture as to the meaning which is intended to be conveyed, and it only leaves us to determine whether or not the plaintiff below made the *prima facie* case which entitles him to the application of the rule. The record shows that he introduced a patent from the United States, with proper deeds of conveyance from the patentee or his heirs to the plaintiff, and this the supreme court of the United States holds is sufficient to recover in ejectment. In *Bagnell v. Broderick*, 13 Pet. 436, it is said: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government in reference to the public lands declares the patent the superior and conclusive evidence of legal title. Until it issues, the fee is in the government. By the patent it passes to the grantee, and he is entitled to recover the possession in ejectment." If no other evidence had been introduced, the court would have directed the verdict. So far as the title set up by virtue of the patent and deeds introduced by the plaintiff is concerned, the burden of proof would remain with the plaintiff, notwithstanding any

proof that defendants might offer to contradict or disprove the same. But if the defendants set up a title in themselves, independent of the proofs made by the plaintiff, then they must, in regard to the title thus set up, assume the burden of proof, and maintain the same by a preponderance of the evidence; and this goes to the extent of proving all acts and things that would be required to constitute such right or title. Thus the supreme court says: "It is a general principle that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title. It is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve." *Williams v. Peyton's Lessee*, 4 Wheat. 77. The defendants, in order to defeat the effect of the prima facie case thus made by the plaintiff, set up a right or title in themselves to a part of the land in question, notwithstanding the patent and deeds of the plaintiff, by showing that, although such facts existed, yet they (defendants) were working upon and taking ore from a lode which solely had its apex within their (defendants') side lines, and in its dip or downward course had departed from defendant's side lines drawn vertically downward, and had entered the side lines of the plaintiff, drawn vertically downward; that the same is a true fissure vein, with characteristic dip, and between characteristic side walls, and exhibiting characteristic ore, and that they had been and were following such lead, with its apex between the side lines of the defendants' claim, and were taking ore from said vein or lode, and from no other, and in so doing had passed the side lines of the plaintiff's claim drawn vertically downward, and were taking ore from their vein or

lode upon land included in plaintiff's claim, and covered by plaintiff's patent. While under the mining laws of the United States such a defense would be proper, and, if clearly proven, sufficient, yet, under the rulings before referred to, the burden of proof would shift, and clearly be on the defendants, who set it up, to sustain it by a preponderance of the evidence. It is, therefore, our conclusion, when the plaintiff had introduced the patent from the general government, with the deeds of conveyance from the patentee or his heirs to the plaintiff, that he had made what in law is termed a "prima facie case," and that he was entitled to the common law presumption that his lines extend down to the center of the earth. But when the defendants undertook, notwithstanding the proofs introduced by the plaintiff and the presumption of law attached to the same, to establish the fact that, by virtue of a certain act of congress, which contemplates the existence of a certain state of facts and a strict compliance with the provisions and conditions of the same, they were given a right to follow a mineral vein or lode from or across the side lines of their claim into or onto the plaintiff's, and extract ore therefrom, then the burden of proof as to the existence of such state of facts, and the compliance with all the requirements, conditions, and terms of the act, shifted and was upon the defendants. The instruction holding that the burden of proof was upon the plaintiff during the entire trial was error, and the motion for a new trial should have been sustained. Therefore, the judgment will be reversed, and the cause remanded, with direction to grant a new trial.

O'BRIEN, C. J., and FREEMAN and SEEDS, JJ.,
concur.

[No. 438. January 6, 1892.]

EXCELSIOR MANUFACTURING COMPANY,
APPELLANT, v. JESSE M. WHEELOCK,
APPELLEE.

CONTRACT OF GUARANTY—SIGNATURE WITH SCROLL—ASSUMPSIT—EVIDENCE.—Section 2742, Compiled Laws, 1884, providing that, “Hereafter, on all documents or instruments in writing requiring a seal, in this territory, a scroll may be used as a seal instead of a wafer, wax, or other impression required by the common law,” applies only to such written instruments as require a seal at common law, which is in force in this territory. A written contract of guaranty, signed with a scroll appended, with the word “seal” written within the scroll, and acknowledged, before a notary public, as having been signed and sealed by the maker, is not such an instrument in writing, or contract of specialty, as requires a seal at common law, but a simple contract upon which an action of assumpsit will lie; and it was error to refuse to admit such contract in evidence in an action of assumpsit for breach.

APPEAL, from a judgment for defendant, from the Second Judicial District Court, Bernalillo County. Judgment reversed.

The facts are stated in the opinion of the court.

W. B. CHILDERS for appellant.

NEILL B. FIELD for appellee.

O'BRIEN, C. J.—This is an action of assumpsit on a written contract of the tenor following:

“ALBUQUERQUE, N. M., August 27, 1883.

“Excelsior Mf'g Co., St. Louis, Mo.

“GENTS:—I will be responsible for any material purchased of you by George F. Wheelock.

“Yours, JESSE M. WHEELOCK. [SEAL]”

Acknowledged before a notary public. On the trial in the court below to a jury, plaintiff, in support

of his action offered this instrument in evidence. Defendant objected to its admissibility, on the ground that it was a specialty, upon which an action of assumpsit would not lie. The objection was sustained, and, plaintiff offering no further proof, the court, on defendant's motion, directed a verdict in his favor. A motion for new trial was overruled, and the cause is here on plaintiff's appeal from the judgment. The only question submitted for our determination is, was the paper offered a simple contract or a specialty?

CONTRACT of
guaranty: signa-
ture with scroll:
assumpsit: evi-
dence.

If the instrument was sealed, the ruling of the court was correct; if not, it should have been admitted. It had no common law seal, but a scroll, with the word "seal" written within the scroll, and it was acknowledged, before a notary public, as having been signed and sealed as the voluntary act of the maker. The defendant contends that it is a specialty, within the meaning of section 2742, Compiled Laws, 1884, which as amended reads: "Hereafter, on all documents or instruments in writing requiring a seal in this territory, a scroll may be used as a seal instead of a wafer, wax, or other impression required by the common law." Appellant maintains that the only instruments affected by the statute are such as were required to be made under seal at common law; that this written guaranty was not one of such instruments; and hence that the scroll appended to the signer's name, being unauthorized by the statute, did not impress the paper with the legal attributes of a specialty. If this position is well taken, the instrument was a simple contract, and, as far as the exception to it goes, the court erred in excluding it from the consideration of the jury. At the common law it is essential that certain written instruments, to insure their validity, be properly sealed; other instruments may or may not be, at the option of the parties. No law of this territory, common or statutory, ever

required an instrument like the one offered to be executed under seal. What, then, is the effect of the section cited upon this paper? Its language does not appear to us ambiguous. It must mean that in all written instruments whose validity, by the laws in force in the territory, depends upon their being sealed, according to the solemnities of the common law, a scroll shall be deemed the equivalent of a common law seal. The statute, fairly construed, does not mean that any writing to which the parties may affix a scroll becomes thereby a sealed instrument. If such were its effect, the writer of an ordinary note of inquiry about the affairs of a distant friend might, by adding a scroll to his signature, invest his correspondence with the legal dignity of a specialty. We could not, without reflecting upon the intelligence of the territorial legislature, give the words used in the act so comprehensive a meaning.

Appellee informs us, in the brief of his learned counsel, that in South Carolina, Virginia, Maryland, and Pennsylvania, scrolls, even without statutory authority, have been held to be equivalent to common law seals. Such may be very true and proper in certain cases, where vested rights, etc., are in jeopardy or assailed. But in the present case, when a suitor is deprived of a hearing in a court of justice because certain unimportant formalities or informalities appear upon the face of the paper, evidencing his rights, and in this territory, where the common law is, by express statutory enactment, declared to be "the rule of practice and decision," we do not feel at liberty, unnecessarily, to depart from any of its refined distinctions. Lord Coke, 3 Inst. 169, thus defines a "seal:" "Sigillum est cera sine impressione, non est sigillum." No other form of seal was recognized at common law. *Mill Dane Foundry v. Hovey*, 21 Pick. 417; *Lightfoot and Butler's case*, 2 Leon. 21; *Warren v. Lynch*, 5 Johns. 239. In the case last cited, Kent, C. J., delivering the opinion of

the court, emphasizes the doctrine that "the ancient authorities are explicit that a seal does, in legal contemplation, mean an impression upon wax." *Warren v. Lynch*, 5 Johns. 239. The suit in which the decision was rendered was an action of assumpsit, brought by plaintiff, as first indorsee of a promissory note, against the defendant as maker. The note was as follows:

"PETERSBURG, VIRGINIA, August 27, 1807.

"Four months after date, I promise to pay Hopkins Robertson or order the sum of seven hundred and nineteen dollars, twelve and one half cents. Witness my hand and seal. Payable in New York.

"THOMAS LYNCH. [L. s.]"

The eminent chief justice, in commenting upon the instrument, says: "The note was given in Virginia, and by the laws of that state it was a sealed instrument or deed. But it was made payable in New York, and, according to a well settled rule, it is to be tested and governed by the laws of this state. Independent, then, of the written agreement of the parties, * * * this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other states of substituting a scrawl for a seal; and what was said by Mr. Justice Livingston in the case of *Meredith v. Hinsdale*, 2 Caines, 362, in favor of such a substitute, was his own opinion, and not that of the court. * * * A scrawl with a pen is not a seal, and deserves no notice. The law has not, indeed, declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression is perhaps not material. But this scrawl has no one property of a seal. *Multum abludit imago*. To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. * * * The calling

a paper a 'deed' will not make it one, if it want the requisite formalities." By usage or by express statutory enactment, the scroll is adopted as a sufficient seal in Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Wisconsin, and in New Mexico, within the limitations of the section of the statute hereinbefore cited.

The ordinary language employed in the statutes of several states authorizing the use of the scroll for the common law seal is usually to the effect "that every instrument in writing to which the maker affixes a scroll by way of seal shall be of the same force and obligation as if it were actually sealed, provided the maker shall in the instrument recognize such scroll as having been affixed by way of a seal." The decisions of the courts of last resort in some of those states, upon the legal effect of the particular statutory language employed sanctioning the change, may not be always harmonious; still we have been unable to find in any of them, including *Hacker's Appeal* (Pa. L. R. A. 861), anything at all inconsistent with the conclusion reached by us that the writing in suit is not a sealed instrument. It is for the legislature, not the courts, to change the law, when a change is deemed advisable. The instrument, then, had not a common law seal, and the scroll used as a substitute therefor is not authorized by the statute. Hence it was not a specialty, either at common law or under the statute, and its exclusion was error. The "seal" is gradually falling into disfavor and disuse. It is one of the few remaining relics of a semibarbarous age. Among a rude and illiterate people, at a time when but few of the nobility, and still fewer of the common people, were able to write their names, the rule requiring the genuineness of their signatures to be attested by the

use of impressed symbols of wax or wafer was founded in necessity; but rigorously to perpetuate and dignify such usage, cessante ratione, in an age and country where illiteracy and ignorance are almost unknown, would be unreasonable and retrogressive. The written guaranty of the defendant requiring no seal to make it valid at common law, and the scroll being unauthorized, as a seal, by the statute, the appended certificate of the notary, to the effect that the maker acknowledged that he had signed and sealed it, can not change the legal character of the instrument, as a bare inspection thereof shows that it was not sealed. Neither the maker nor the notary has the power to declare that a simple contract, in form and substance, shall be held to be a specialty. The requirements of the common law may not be evaded by so simple a process. We do not decide in this cause that a proper impression upon paper would not be sufficient to constitute a common law seal in this territory, although the same is not made in wax or other plastic substance. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

FREEMAN, McFIE, and SEEDS, JJ., concur.

[No. 486. January 6, 1892.]

JOHN W. RIPLEY, DEFENDANT IN ERROR, v. ASTEC
MINING COMPANY, PLAINTIFF IN ERROR.

ASSUMPSIT—ATTACHMENT—PLEA TO AFFIDAVIT—FAILURE TO PLEAD TO
DECLARATION—JUDGMENT BY DEFAULT.—In an action of assumpsit,
by attachment, on a demand due, where the defendant answered
traversing the affidavit for attachment, but failed to plead to the
declaration, judgment by default was properly entered under sections
1923, 1933, and 1934, Compiled Laws, entitling plaintiff to the bene-
fits provided in sections 2130, 538, and 2061, Compiled Laws.

ERROR, from a judgment for plaintiff by default, to the Third Judicial District Court, Grant County. Judgment affirmed.

The facts are stated in the opinion of the court.

G. D. BANTZ for plaintiff in error.

R. P. BARNES and FIELDER BROS. & HEFLIN for defendant in error.

O'BRIEN, C. J.—This is an action of assumpsit, ancillary to which a writ of attachment issued at the commencement of the suit. Defendant appeared at the return term, and filed an answer traversing the allegations of the affidavit for the writ, but failed to plead to the declaration. On such failure defendant's default was entered during the term, and judgment rendered in favor of plaintiff for the amount stated in a verified account, filed with the declaration as a bill of particulars. The defendant below brings the cause to this court on writ of error, contending that no judgment could be entered upon the merits of plaintiff's claim until the issues raised by the answer to the grounds of attachment alleged in the affidavit had been determined.

PLEA to affidavit:
failure to plead
to declaration:
judgment by de-
fault.

This is the only question presented for our determination. The suit was commenced, it appears, under the provisions of section 1923, Compiled Laws, 1884, upon a demand due. The writ, inter alia, commanded the defendant "to answer the action of the plaintiff." Section 1933, Id. In such case, "when defendant is cited to answer the action, the like proceedings shall be had between him and the plaintiff as in ordinary actions on contracts, and a general judgment may be rendered for or against the defendant." Section 1934, Id. We are clearly of the opinion that the foregoing provisions entitle plaintiff to the benefits provided in

sections 2130, 538, and 2061, Compiled Laws, and in rule 9 of district courts. Section 2130 provides that, if no answer be filed in an action before the third day of the term, final judgment shall be entered against defendant. Section 2061 provides for assessment of judgment in case of default. Section 538 repeals, "any law which requires the court to wait until the third day before a defendant shall file his answer to a plaintiff's petition or complaint."

In the state of Missouri, under statutory provisions claimed to be somewhat similar to those contained in the compilation of this territory, plaintiff in error strenuously contends that the supreme court holds that defendant is not bound to plead to the declaration if the sufficiency of the grounds set out in the affidavit for the writ be contested, until the determination of such issues, and cites the following in support of such contention: Cannon v. McManus, 17 Mo. 345; Fordyce v. Hathorn, 57 Id. 120; Hatry v. Shuman, 13 Id. 547; Ellis v. Lawrence, 42 Id. 153; Green v. Craig, 47 Id. 90; McDonald v. Fist, 60 Id. 172; Burgoin v. Wheaton, 30 Id. 215. There may be some doubt whether the authorities cited go to the extent claimed by defendant. It is clear that the court does hold, in those cases, that, unless the defendant assails the affidavit for the writ before pleading to the merits of the declaration, he thereby waives all objections to the sufficiency of the affidavit; but it is very doubtful if it goes to the extent of holding that the defendant is absolutely relieved from pleading to the merits of the action until the determination of the issues made upon the grounds of the attachment. Be that as it may, the question is one of practice, and we prefer to decide it in accordance with our view of the legislative intent, as gathered from our own statutes, as well as in furtherance of the orderly and expeditious disposal of judicial proceedings

which may exist to the right to attach property have no necessary connection with the defenses to the cause of action, the right to plead in abatement is not upon the condition of abandoning all other defenses, but, on the contrary, all other legitimate defenses to the merits may be interposed at the same time." The answer to the statutory averments contained in the affidavit is not authorized for the purpose of testing plaintiff's right of recovery in the action, but merely for the purpose of imposing upon the plaintiff the burden of showing that he had a statutory right of holding defendant's property as security for any judgment that he might ultimately obtain in the action. In so holding we are to a great extent supported by a decision of this court,—*Staab v. Hersch*, 3 N. M. 209. The judgment of the court below is affirmed.

SEEDS, FREEMAN, and LEE, JJ., concur.

McFIE, J., having heard the cause below, took no part in this decision.

[No. 466, Consolidated with Nos. 467, 468, 469. July 26, 1892.]

TERRITORY OF NEW MEXICO, APPELLANT, V.
LUCIANO BACA, APPELLEE.

CRIMINAL LAW—GRAND JURY—VALIDITY OF ACT OF FEBRUARY 26, 1889—
SPECIAL LEGISLATION.—Held: The act of February 26, 1889 (Session Laws, 1889, p. 227), providing for the summoning and impaneling of grand juries, in so far as it attempts to regulate the trial of offenses against the territory, by enacting that the jury drawn from the several counties composing the judicial districts shall alone have authority to make presentments of all crimes committed against the territory in the county in which the court is held, and requiring the votes of twelve grand jurors to find an indictment in Santa Fe county, and of only nine grand jurors to find an indictment for the same offense in other counties composing the judicial district, is in plain contravention of the act of congress, approved July 30, 1886, providing that no local or special law shall be enacted by the legislature of any territory for summoning and impaneling grand or petit juries, and void to that extent.

APPEAL, from a judgment in favor of defendant, from the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT, solicitor general, for the territory.

H. L. WALDO, NEILL B. FIELD, and THOS. SMITH for appellee.

FREEMAN, J.—These causes involve the same questions, and for convenience of argument have been consolidated. These are appeals from the judgment of the district court of the county of Santa Fe, sustaining pleas in abatement to indictment found against the defendants in the above numbered causes. The cases presented involve the validity of the act of the legislature which became a law by limitation on February 26, 1889. The act in question provides substantially that, in counties of the territory wherein courts are held for the trial of causes arising under the laws of the United States,—that is to say, in the counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana, the number of grand jurors shall be twenty-one, any twelve of whom may find an indictment, and that in all the other counties the number of grand jurors shall be twelve, any nine of whom may find an indictment. We held at the last term of this court, in the case of

GRAND jury: validity of Act February 26, 1889: special legislation.

U. S. v. DeAmador, 6 N. M. 173, that, so far as it relates to trials of causes arising under the laws of the United States, the statute is not in contravention of the constitution of the United States, nor of any act of congress. The jury as to these courts, and as to this class of cases, is a good common law jury, and the several counties composing the district over which the

jurisdiction of the court extends constitute the vicinage. So far, however, as the act attempts to regulate the trial of offenses against the territory, a different rule applies. It enacts that the jury drawn from the several counties composing the judicial districts, which, for the sake of distinction, we shall call the "federal" jury, shall alone have authority to make presentments of all crimes committed against the territory in the county in which the court is held. It follows that under the provisions of this statute a citizen of the county in which the federal court is held may be indicted by the vote of twelve men, neither of whom may be a citizen of the county wherein the offense is alleged to have been committed. And again, under this statute, it requires the vote of twelve grand jurors to find an indictment in Santa Fe county, and of only nine to find an indictment for the same offense in other counties composing the judicial district. This, we think, is clearly in contravention of the act of congress of July 30, 1886, which provides that no local or special law shall be enacted by the legislature of any territory for summoning or impaneling grand or petit jurors. 24 U. S. Stat., p. 170. It is, therefore, the judgment of the court that the judgment of the district court be affirmed, and it is so ordered. O'BRIEN, C. J., and McFIE and LEE, JJ., concur.

OPINION OF TRIAL JUDGE.

SEEDS, J.—Believing that the importance of this case requires a fuller presentation of the facts and questions involved than have been given it in the opinion of the court, I take advantage of the law permitting the trial judge to give his views upon the case, to file my opinion as delivered in the district court. The defendant in this case was indicted for murder on the—— day of——1890, by a grand jury impaneled in the county of Santa Fe in accordance with the require-

ments of section 4, chapter 96, of the Laws of the Twenty-eighth Assembly of this territory. By sections 4 and 5 of that law, it is provided that "in the several counties of this territory where courts are held for the trial of causes arising under the laws of the United States, that is to say, in the counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana," the number of grand jurors shall be twenty-one, any twelve of whom may find an indictment; while in the other counties of the territory, "excepting the counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana," the number of grand jurors shall be twelve, any nine of whom may find an indictment. Further, by the provisions of said law, the grand jurors who serve in the territorial courts and find indictments for infractions of the laws of the territory in the four counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana, are drawn, not from the body of those respective counties, but from the whole district, comprised of two or more counties, over which the United States district court has jurisdiction solely for the trial of infractions of United States law; while in all other counties of the territory the grand juries are drawn from the body of their respective counties. In fact, by the express terms of section 4 of this law, the same grand jury in each of the four counties above specifically mentioned act in a dual capacity—as a territorial grand jury for the district court of the respective counties, and as a United States grand jury for the respective district of which the county may be the head. To this indictment so found the defendant interposed pleas, alleging in substance the illegality of the grand jury so summoned and impaneled. The territory filed replications to the pleas, alleging the legality of said jury. The replication is in the nature of a demurrer.

The positions taken by the defendant are two: First. That the constitution of the United States, the

organic act of this territory, and the law of congress governing territories, constitute the constitutional authority of the territory; and that by the United States constitution (amendment 5), which says that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," is meant a common law grand jury, which contemplates a body of men legally drawn from the county or vicinage wherein the crime was committed; in other words, such a grand jury as was known to the law when the constitution was adopted. Second. That by the law of July 30, 1886, passed by the United States congress, there was a specific prohibition upon the territorial legislature against passing local or special laws for summoning or impaneling jurors; and that the law under which the grand jury was drawn which found the indictment in question was illegal under either of these positions. Upon the other hand, the territory contends that the constitutional requirements are met, if there is an impartial grand jury, legally drawn; and that it is discretionary with the legislature as to the number of persons it will place upon the grand jury, and as to the area of territory from which they may be drawn; and that the law in question has made a proper classification of the counties, and the terms used are general as to the classes, and hence, under well known legal principles, the law is general, and not local or special.

That the question here raised, as to the legality of the territorial jury system, is momentous and of great importance, is evident. Upon the one hand is to be considered the possibility that citizens are being indicted, tried, and possibly being found guilty by juries which may be wholly illegal; rights being jeopardized by an institution which has only the semblance of constitutional authority; and those privileges, which are of such inestimable value that courts and legislatures

for centuries have struggled with jealous care, by refinements which at times would seem to partake of scholastic subtlety, to protect it from insidious overthrow, may be each day threatened by the appearance of a legal institution which in fact is without the sanction of law. Upon the other hand, to set the law in question aside as illegal may allow of the escape of some criminals who ought to be punished, render nugatory and useless much work that has been done, and make useless the expenditure of large sums of money. Yet the question ought to be met boldly, and decided upon its merits, unbiased by any feared evil consequences. A wrong principle ought not to be upheld for fear of the temporary ill consequences following its condemnation. A wrong principle is eternally wrong. Evil consequences following its abrogation are temporary, and are forgotten in the presence of the beneficence of the true principle. The law is well settled that a court should not hold an act of the legislature unconstitutional if it has any reasonable ground upon which to base the legality of the measure. The duty of the court is to use every reasonable intendment to sustain legislation. In *re New York El. R. R. Co.*, 70 N. Y. 327. Upon this principle I shall act considering the questions raised by the pleadings before me. I shall first consider the proposition of the defendant in regard to the character of a grand jury, and the power over it by a territorial legislature. As preliminary, the inquiry is, are the constitution of the United States, the organic act of the territory, and the laws of the United States in reference to territories, the constitutional law of the territory? In other words, do they stand to the territory and its legislature in the same relation as a state constitution does to the state and its legislature? It seems to me that this question must be answered in the affirmative. It has been so held generally in *Re Attorney General*, 2 N. M. 49, cases cited;

and, as to the seventh amendment of the constitution, in *Webster v. Reid*, 11 How. 460. There can be no doubt but that the fifth amendment to the constitution, which says: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury,"—is part of the constitutional law of this territory, and any attempt to do away with a grand jury in the territory would be absolutely null and void. In fact, as the territories are but portions of the government of the United States itself, as distinguished from the state governments, I have no doubt but that it would be futile and void for congress to attempt to give them the right to make presentments for crime by informations, as is done in some states, where the grand jury system is abolished, so long as the fifth amendment of the constitution stands, and as to those crimes contemplated in that amendment. The territorial laws, as distinguished from the laws of the United States in the territory, have not the same relation to each other, or rather want of relation, as is found between the laws of the state and of the nation over the same territorial area. In the states it is a matter of two distinct sovereignties. In the territory it is the same sovereign acting by two agents,—the one the United States congress, the other the territorial legislature acting in subordination to the greater agent. A state may change its constitution; a territory can not. A state, by its constitution, can change or abolish a grand jury system; a territory has no such power. A state has its constitutional power within itself; that of a territory is without itself. These general principles are necessary to be enunciated, for many of the cited cases upon this question are predicated upon state legislative action, which has behind it a far different constitutional qualification than that of a territorial legislative action, and hence which explain adjudications which would otherwise seem to be in

point. At the time of the adoption of the constitution of the United States, in the grand jury of common law the number drawn was usually twenty-four though only twenty-three were sworn, and twelve were necessary to find an indictment. It is said, "If there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, though some of the rest of their number dissent, it is a good presentment." 2 Hale, P. C. 161. From this citation, and other authorities which might be quoted, it is quite evident that, with possibly the exception as to the number necessary to find the indictment, the exact number upon the panel was not definitely fixed. In other words, the number of a grand jury is not an absolute requirement of a common law grand jury. This is borne out by the fact that, while states under constitutional sanction have reduced the number of grand jurors, they have not reduced the number of petit jurors which try common law crimes; that is, the number is an integral part of a common law petit jury; not so of a grand jury. So, if congress should alter the number of grand jurors, or should allow territorial legislature to do so, there would not necessarily be any innovation upon the common law jury. In the case of *Reynolds v. U. S.*, 98 U. S. 154, cited by the territory, the question was as to whether the United States statute (section 808), requiring the common law number on a grand jury, or a territorial statute, requiring fifteen on such jury, should be the jury,—they decide the latter,—but this only goes as to the number; and I can not believe that that court intends its authority in this case to be used as upholding any principle which gives the territorial legislature plenary power to draw together a body of men, with any qualification, from any jurisdiction, and, by labeling it a grand jury, have it perform the most important duty of that body as a legal

grand jury of the territory. However, if that is the intention, it will be shown by its amenability to the rules of reasoning. It will be noticed that, strictly construed, that authority only grants territorial legislatures the power to change the number. That question does not arise in these cases, for this law provides for twenty-one on the panel and twelve to indict, which is a good common law grand jury, if in all other particulars agreeable to law.

The contention here is this: These defendants are being tried for a crime against the territorial laws, committed in the county of Santa Fe, in a territorial court for that county, whose jurisdiction is only in that county, upon the presentment of a grand jury part at least of whom were drawn from other counties, not a part of the county or district of the territorial court. Is such a grand jury such a one as the constitution intended citizens should be indicted by, or should they be drawn from the county or district in which the crime was committed,—that is, from the vicinage? The history of the evolution of the grand jury distinctly shows that it came forth from the same matrix as the petit jury. It branched out from it, or, rather, the original body had two functions, which, in process of time, developed into two distinct bodies, known as the “grand” and “petit” juries. Proff. Jury, sec. 28. While the exact time may not be known when this division of functions became a certainty, it is clear that in the reign of Edward III (1327) it was an established fact. Of course, up to that time it was drawn, as was the petit jury, they being one and the same, from the body of the county, or the vicinage. This was absolutely necessary from the original character of the body,—that of being in part witnesses of the facts as well as triers of them. The question now presents itself, has the character of the place from which they have been drawn

ever been changed; that is, the principle of drawing from the vicinage. If it has not, but for four hundred and fifty years in England, up to the time of the adoption of the constitution of the United States, the principle of drawing from the county or vicinage has been held as an unquestioned legal requirement of a grand jury, it can be reasonably inferred that the people have considered that as an essential element of the common law jury. And if, in the changes in habits, customs, and thoughts, in the different character of our necessities, in the evolution of our legal system for the hundred and more years since the adoption of the constitution in all the states, there has been no innovation upon that principle, it would seem that it was a pronounced element in a legal grand jury; nay, more, almost the substance of that body. If there has been any innovation upon this principle recognized by any court or law the territory has failed to show it, and I have, after diligent search, failed to find any. There has been one instance—in Missouri—where at one time the constitution gave the legislature authority to make such a change, but after ten years (in 1875) a new constitution was adopted, wherein this power was taken away; and when afterward the legislature attempted to give the right to a grand jury of one county to find an indictment against a person in another,—not of the vicinage,—the supreme court promptly declared the law void. *Ex parte Slater*, 72 Mo. 102. The argument of this instance is simply to the effect that the people of that sovereignty must have considered the innovation a dangerous one, and threatening the liberty of the citizens, if, after ten years, they struck it from their constitution, and took their position upon the common law grand jury of the county or vicinage.

Now, what are the cases cited by the territory to justify the legislature of this territory in making a change in the jury system which has no parallel in

principle in any state or country having the common law jury system for over five hundred years, except the case in Missouri, which was done by a constitutional enactment, and which was, with almost precipitate alacrity, rescinded? With the exception of the case in 98 U. S., heretofore considered, only two others have been handed me, viz., *Brannigan v. People*, 3 Utah, 488, *Parker v. People*, 4 Layer's Reports (Colo.), 803. The first case was decided in 1869. The records show that in that case seventeen grand jurors found the indictment, while the territorial statutes require twenty-four eligible men. The prisoner claimed that it should be found by a common law grand jury, and that twenty-four was not such a jury; hence the statute was void. The court denied this, and held that the territory, like a state, "has the right to supersede the common law rule, and provide a new rule, by which a greater, if not a less, number than that of the common law may be provided." This, if good law, only stated that as to the number it could be changed. It lays down no general principle giving the legislature the right to practically wipe out the common law grand jury. This authority is weakened as to this point even by two errors: First. Reasoning from state power to territorial power. This can not safely be done, especially as in all known cases changes in the grand jury have been under interpretations of special constitutional sanction. Second. The court decided that, as territorial laws had to be submitted to congress for approval or disapproval, and this law had been, with others, and not disapproved, therefore it was valid. This holding has been distinctly repudiated. In the Colorado case the defendant took the ground that to indict him by a grand jury of less number than a common law grand jury was not "due process of law," as used in the fourteenth amendment to the constitution. This was held not

well taken, upon the authority of 110 U. S. 516, which states that the state of California under its constitution can prosecute felonies by informations; in other words, that a state, in enforcing its own laws, can, if it sees fit, dispense entirely with grand juries. These cases represent the territory's side of this issue. I ask, is there anywhere, even by implication, a decision that any legislature under the immediate control of the constitution of the United States and the laws of congress can set aside the requirements of the common law grand jury as to being drawn from the county or district. Incidentally I wish to remark that "county" and "district" are synonymous terms as to the principle involved. We are dealing entirely with territorial courts, and each court has a definite jurisdiction, and that the county. In the case of *Clive v. State*, 7 N. W. Rep. (Neb.) 444, the court, in discussing the question of a district, and a grand jury for it, say: "In other words, the trial district and the jury district must be the same." There are no cases that I have been able to find upon the immediate question at issue excepting the Missouri case above, and for the probably good reason that no such law as the one under consideration can be found upon the statute books. The danger in this law is the principle involved in it. If the legislature had the constitutional right to take one grand juror from San Juan county to find indictments against the citizens of Santa Fe county, as a grand juror in a court limited to the county of Santa Fe, it has the right to take all of them. There is no escaping this proposition. It is logically unanswerable. Hence the question presents itself, does that power fall, like the mantle of Elijah, upon the shoulders of Elisha, from the United States constitution upon the territorial legislature. It never has been used previously, if it may. The congress of the United States has never seen fit to use such power that I am

aware of. In reason, then, can we suppose such a power legal? We can only arrive at an answer to this by analogical reasoning. Proffatt, in his work on Jury Trials, at section 44, says: "On account of the responsible and weighty duties devolving upon a grand jury, it has always been the practice to exercise a greater discrimination in its selection than in the case of a petit jury." Why this care? Clearly to protect the right and liberty of the subject. In the case of *Swart v. Kimball*, 5 N. W. Rep. 635, Judge COOLEY, of Michigan, condemned with righteous indignation a law which allowed an information to be sworn out in one county, and a citizen to be taken into another for trial. He ought by right to be tried in the county in which the crime was committed, and it was an outrage to take him out of it. If the grand jury is of more importance than the petit, is it not an outrage to overturn a custom hoary with age, and draw a jury from counties far distant, and not a part of the vicinage, as this law in fact and principle does? Case after case might be cited where it is the right of the accused to be tried by a jury of the vicinage, unless he take a change of venue, and that even, at first, was denied. What power, then, has been conferred upon the legislature to change the same essential as to a grand jury, when it can not as to a petit? Incidentally, though not in this case, it may be stated that this very law does provide for a petit jury, which overturns all known rules of law, and in substance compels an accused, whether he will or not, to take a change of venue; for it seems to me plain that while venue has reference to territory, it means territory with people. We do not take changes of venue to unsettled counties. The law is to protect against people, not areas. Hence there is no difference in the general principle between taking a man to San Juan to be tried or bringing the people from San Juan to Santa Fe to try him.

I have only heard one serious objection to the line of argument here advanced, and that is that the grand jury is not necessarily of the vicinage or county; because, by the law, crimes committed upon the high seas, or in places in insurrection, or so near boundary lines of counties as to be uncertain, the jurisdiction may be given to the grand juries of counties in which they did not occur. But in my judgment these exceptions prove the rule. They all arise *ex necessitate*,—from necessity. Where there is no absolute necessity, the rule does not apply, and can not be invoked. Then, too, it is the reverse of this case. There the case is from necessity taken to San Juan; here, from no necessity, the grand jury is brought to Santa Fe, to try a matter which has a vicinage over which a territorial court has jurisdiction limited to the county. When one considers how jealous the law is of the accused's rights; how technicalities are successfully pleaded against indictments; how, if, in some jurisdictions, the foreman of the grand jury neglects to place his name upon the indictment, or if the names of the witnesses are left off, or the prosecuting attorney fails to sign it, or if the panel is irregularly drawn, though every man were perfectly qualified, or if one man is disqualified, though the twelve who find the indictment are qualified, that in each case the indictments are promptly quashed,—it would seem to be a case of literal exemplification of the scriptural saying of straining at a gnat and swallowing a camel to uphold this law after such rulings. While there is no direct adjudication upon the point in question, yet the uniformity of the laws requiring the grand juries to be drawn from the county or district over which the trial court has jurisdiction, for over five hundred years, under state, territorial, and national governments, both in this country and in England, makes it a moral,

yes, a legal, certainty that under the constitution it is an integral part of a territorial grand jury that it should come from the county or vicinage, and, if it does not, that it is an illegal body. If, however, there could be a doubt upon the position just contended for, illegality of this law would have become manifest when read in the light of the positive inhibition upon territorial legislatures against passing any local or special law in regard to the summoning and impaneling of juries, by the United States congress. See chapter 818, 1st Sess. 49th Cong., p. 170. I take it that summoning and impaneling juries includes all the steps and requirements necessary to obtain a legal jury in the jury box. It includes the numbers and territory from whence drawn, as well as requirements in regard to personal qualifications. It would be absurd to say that, if the method of drawing and personal qualifications were the same in each county, the requirements of this statute would be satisfied though in Santa Fe county eight jurors drawn from Santa Fe city constituted a good jury there, while in San Juan twelve jurors from the whole county were sufficient, and in Taos twelve jurors drawn from the first district would be a good jury. Is this law, as regards the number upon the grand jury, and the territory from which drawn, local and special, or general? It is well to consider its exact terms. First it says (section 4): "In the several counties of the territory where courts are held for the trial of causes arising under the laws of the United States,—that is to say, Santa Fe, San Miguel, Bernalillo, and Dona Ana;" and in the same section it again says: "It being the true meaning and intention of this act to provide for but one grand and petit jury in the counties where causes arising under the laws of the United States are triable,—that is to say, in the counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana," etc.; and section 5 reads as follows: "In

all the counties of this territory, excepting the counties of Santa Fe, San Miguel, Bernalillo, and Dona Ana, the number of grand jurors shall be twelve, and nine of whom may find an indictment; and the number of petit jurors shall be twenty-four." By the previous section the number of grand jurors in the four excepted counties shall be twenty-one, any twelve of whom may find an indictment, while the number of petit jurors shall be twenty-four. By section 7 the jurors for both grand and petit juries for the four excepted counties are to be drawn from the bodies of the respective districts. And it must be remembered that these jurors so drawn are also to act as juries for the territorial courts in these counties. By section 8 it is provided that in all counties but those in which causes arising under the laws of the United States are tried the juries are to be drawn from the body of the county. Now, it seems too clear for argument that upon the very face of this law it is manifestly not general, but special and local. Part of it applies to four counties, and no more; while part applies to all the other counties, excepting those four. In no view, generally speaking, has this law a general application to the territory. Part is local to four counties; part is local to ten counties, easily ascertained; and four are excluded.

But the territory contends that there may be classifications of agencies under government, and a law which is applicable generally to that agency or class is general, and not local. This contention is correct, and the only question is, does the law of classification hold in this case? Upon this point the territory plants itself as its only tenable ground. In truth, by taking its position here, it says that if this is not tenable the law must be held local and special, and, therefore, subject to the inhibition of congress. What authorities are cited by the territory to sustain its position? I will endeavor to fairly and honestly consider them.

In passing it may be well to state that all the cases cited upon this proposition are based upon substantially the same character of inhibition as to passing local or special laws in certain specified cases. A leading case upon this point is *In re New York El. R'y Co.*, 70 N. Y. 327. In this case the legislature passed what was known as the "General Rapid Transit Act," which was, by its title, "An act further to provide for the construction and operation of a steam railway or railways in the counties of the state." By its terms it could only apply to certain communities, but those communities were not named or limited by the act. To all intents and purposes it was general. In disposing of the objection that it was a local law the court said: "The act in form offers the same opportunities to all citizens of the state. The fact that some are not able to avail themselves of the opportunities does not impugn the general character of the act." How is it with the law I am considering? Does the act in form offer the same opportunities to all citizens?

Can a law in form or fact be of a general character which says: "If you live in Santa Fe county you have twelve chances against being indicted for murder, but if you go to Taos you only have nine chances; while if you are in Rio Arriba county you can have an accusation against you inquired into by the people among whom you reside, but if you are in Santa Fe county your case must be inquired into by a body drawn from other counties." To the like effect is the case *In re Church*, 92 N. Y. 1. The court says in this case: "A law relating to particular persons or things as a class was said to be general (in the case above, 70 N. Y. 328), while one relating to particular persons or things of a class was deemed local and private. The act of 1881 relates to a class, and applies to it as such, and not to the selected or particular elements of which it is composed. The class consists of every county in

the state having within its boundaries a city of one hundred thousand inhabitants, and territory beyond the city limits mapped into streets and avenues. How many such counties there are now, or may be in the future, we do not know, and it is not material that we should. Whether many or few, the law operates upon them all alike, and reaches them, not by a separate selection of one or more, but through the general class of which they are individual elements. * * * By its terms it applies equally to every other county which may prove to be within the constituted class." Although cited by the territory, this authority is decisively against it. What classification is there in the law before us? Either it is simply counties, in which case the law is not uniform and general, or it is "those counties in which United States cases are triable." But this classification under the above rule fails, because it does make a separate selection of the elements. Four counties, and four only, can ever be in the classification, and the fact is that there is to-day a United States trial county—Socorro—which by no rule of interpretation can come within this law. On the other hand, as to the other counties, there is no rule of classification at all, and, if there were, it would be fatally defective, because it excluded by name four counties; and if to-morrow this county should lose its position as a county for the trial of United States cases, no power or rule exists to place it in the other class. In the case of *Wheeler v. Philadelphia*, 77 Pa. St. 338, the court only held that cities may be classified, so that a law applicable to the class is not local. There can be no question as to that proposition. They say: "It permits legislation for classes, but not for persons or things of a class." In the cases of *McAunich v. Miss. & Mo. Railroad Co.*, 20 Iowa, 338, and *The Iowa Railroad Co. v. Soper*, 39 Iowa, 112, the same idea is sustained. In the latter case, quoting from the former, the court

says: "They [the laws under consideration] are general and uniform in their operation upon all persons in like situation." It is plain that this jury law is not, and never can be. The persons in Socorro are in like situation as Santa Fe, but the law applies to them differently. The holding of the Iowa court is simply for the case in point, and does not fully state the law, as in the New York cases. The law, to be general, contemplates that all persons or things who are now or may in the future, come under its classification will be amenable to its jurisdiction. The case of *Welker v. Potter and Wife*, 18 Ohio St. 85, simply decides that a law having a uniform operation upon all cities in a certain class is a general law. This in no way sustains the jury law under consideration. The last case cited by the territory is that of *People v. Sharp*, 107 N. Y. 427, in which the court takes occasion simply to reaffirm its holdings in the two New York cases above cited.

The result, then, of the earnest labors of the counsel of the territory is an utter failure to find one authority which by the most learned ingenuity can in the remotest degree place this law in the category of classification which will justify its being considered as obedient to the express requirements of the congressional enactment. But there are cases which plainly, by their authority, condemn the law in question. In the case of *McCarthy v. Com.*, 2 Atl. Rep. 423 (a Pennsylvania case), the legislature passed a law regulating the affairs of counties the population of which exceeds one hundred thousand and is less than one hundred and fifty thousand. It is noticeable that this is much broader than our jury law, for no county is named. The counties might change in the future, and hence it might well be contended under the authorities above cited that the law was a general law. What does the court say? "But by what process of reasoning is this legislation, which has selected for its operation three

or four counties from all those composing the commonwealth, to be justified? Is the justification to be found in the well recognized legislative power of classification? We think not. It is admitted that classification, even where not specifically recognized by nature, custom, the laws of trade, or the constitution, must in certain cases be adopted *ex necessitate*, as in the case of cities under the act of May 23, 1874, *Wheeler v. Philadelphia*, 77 Pa. St. 338, and *Kilgore v. Magee*, 85 Pa. St. 401." This law was declared local and special, and hence unconstitutional. In a New Jersey case (*State v. Inhabitants of Bloomfield*, 2 Atl. Rep. 249) the legislature attempted to legislate for localities by passing an act which gave a certain place peculiar privileges under the form of a law, which might apply to indefinite numbers; but by consulting the fact it could be ascertained that only one place was intended. In the discussion of the case the court enunciates the reason for the rule of classification, which seems to me applicable here. It says: "It is thus apparent, I think, that in the judicial mind the distinction necessary to mark a class must be something in the situation or circumstances of the places embraced by the legislative enactment which would render like powers, if granted, inappropriate to and unavailable for other townships. Within this rule of interpretation the law of 1879 can not be vindicated." Measured by this lucid and practical reason for classification, this rule of interpretation, what is there in the situation or circumstances of Santa Fe, San Miguel, Bernalillo, and Dona Ana counties which would render like powers or privileges inappropriate or unavailable to the other counties of this territory? As showing almost as a demonstration that this law is local and special I cite one more case as laying down the rule by which to test the general or special nature of a statute. In *State ex rel. Randolph v. Wood*, 7 Atl. Rep. (N. J.) 286, the court

says: "Disclaiming all intent to further define what is a general law, it will serve the present purpose to say that, under these adjudications, a law is to be considered as general when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law must embrace all, and exclude none, whose conditions and wants render such legislation equally necessary or appropriate to them as a class."

My conclusion is that the jury law of this territory as to the territorial grand jury is—First, unconstitutional, as attempting to set aside a necessary requisite of the common law jury guaranteed to the people by the fifth amendment to the constitution of the United States; second, that the law in question is clearly local and special, and therefore in contravention of the specific inhibition of the congress of the United States upon the territorial legislatures enacting such laws as to summoning and impaneling jurors.

[No. 473. July 28, 1892.]

**MAXIMIANO ROMERO, PLAINTIFF IN ERROR, v.
ANTONIO LUNA, DEFENDANT IN ERROR.**

REPLEVIN—APPEAL FROM JUSTICE'S COURT TO DISTRICT COURT—AFFIDAVIT—AMENDMENT.—Section 2443, Compiled Laws, providing for a trial de novo in all cases originating in a justice's court and removed into the district court, and that the district court shall allow all amendments "necessary in furtherance of justice," includes an action in replevin; and where, in such an action appealed to the district court, the affidavit failed to state the value of the property in controversy, an amendment was asked to correct the affidavit, and refused, the purpose of which was to secure a trial de novo on the merits, such amendment, so sought, was a "necessary amendment in furtherance of justice," and it was an abuse of the court's discretion to refuse to allow such amendment. *Martinez v. Martinez*, 2 N. M. 464.

Id.—AFFIDAVIT—AMENDMENT—JURISDICTION.—The contention, in such case, that the failure to allege the value of the property in question was jurisdictional, and could not be cured by amendment in the district court, was not well taken, and can not be sustained in view of section 7, chapter 48, Laws, 1889, which was in force at the time the cause was heard below, and which is in harmony with the decisions of this court in *Martinez v. Martinez*, supra, and *Sanchez v. Candelaria*, 5 N. M. 405, where it was held that if the application to amend had been made while the cause was pending before the justice, it would have been his duty to permit the amendment to be made, and that the plaintiff's right to amend was not lost by appeal to the district court. *Barruel v. Irwin*, 2. N. M. 223, distinguished.

ERROR, from a judgment in favor of defendant, to the First Judicial District Court, Taos County. Judgment reversed, and cause remanded, with directions to the court below to allow the affidavit in replevin to be amended. O'BRIEN, C. J., dissenting.

The facts are stated in the opinion of the court.

EDWARD L. BARTLETT for plaintiff in error.

N. B. LAUGHLIN for defendant in error.

McFIE, J.—This action of replevin originated in Taos county, and was tried before a justice of the peace and a jury November 5, 1889, resulting in a verdict and judgment for the defendant in error. Appeal was taken to the district court of Taos county, and the cause was placed upon the docket of the September term, A. D. 1890, but it was continued until the May term, A. D. 1891, by agreement of both parties. On the fourteenth day of May, A. D. 1891, being the fourth day of said May term, appellant moved the court for leave to amend the affidavit for replevin. The court denied the application for leave to amend, upon the same day sustained the motion filed by appellee to quash the writ and dismiss appeal, and thereupon gave judgment quashing the writ, dismissing the appeal, and for costs, and awarded execution against appellant.

Motions were made by counsel for appellant to set aside and vacate order quashing writ and dismissing appeal, and for rehearing of said motion to quash writ and dismiss appeal, but the court overruled the same. To the rulings of the court upon all of said motions exceptions were taken, are preserved in the record, and the plaintiff brings the cause to this court by writ of error, to review the proceedings and reverse the judgment of the court below.

There are four errors assigned by the plaintiff in error in this case. First, that the court erred in sustaining the motion of the defendant below to quash the writ of replevin and dismiss the appeal in said cause, over the objection of the plaintiff in error; second, that the court erred in refusing to grant the plaintiff in error leave to amend his affidavit in replevin, as prayed for in his motion for that purpose; third, that the court erred in overruling the motion of the plaintiff in error for a rehearing of said motion to amend, and to set aside and vacate the order, quashing said writ, and dismissing said appeal; fourth, that the court erred in quashing the writ of replevin issued herein and dismissing said action at the cost of the plaintiff in error.

The second assignment of error goes to the merits of the case. It is evident that if reversible error was committed by the court below in refusing to allow plaintiff in error leave to amend his affidavit in replevin, the other errors assigned grow out of that ruling. The second error, therefore, will be first considered. The original affidavit in replevin is as follows:

REPLEVIN: appeal
from justice's to
district court:
affidavit; amend-
ment.

“Maximiano Romero v. Antonio Luna. Replevin. Sworn statement for replevin, before Jose Hilario Lucero, justice of the peace for precinct No. 1, in the county of Taos. The above mentioned Maximiano Romero, being duly sworn, says that he has a good right to the possession of the following described effects

and furniture, and that the same are unlawfully withheld by the said Antonio Luna, to wit: One billiard table, one counter of the same, four lamps, twelve cues, four balls, and other appurtenances to the same.

“MAXIMIANO ROMERO.”

“Sworn and subscribed before me this 4th day of September, 1889.

JOSE HILARIO LUCERO,

“Justice of the Peace.”

The record discloses another affidavit, made by the plaintiff before the same justice of the peace on the thirteenth day of September, 1889, which is as follows (omitting caption):

“Before me, the undersigned, justice of the peace in and for the county and territory aforesaid, personally appeared Maximiano Romero, who, after having been duly sworn by me, deposeth and saith that the effects, chattels, or furniture now involved, and which have been replevied from the possession of Antonio Luna, were not seized by virtue of any suit, execution, or attachment against the property of this complainant; and that the defendant in the original suit, by virtue of which the said effects, chattels, or furniture were unjustly seized by the officer serving that case, has no interest, right, nor title, and had no interest, right, nor title in said chattels at the time when they were unjustly seized, and that the said complainant is entitled to the possession of the same, as one of the lawful owners thereof. Sworn and subscribed to before me in my office at Taos, N. M., this 13th day of September, 1889.

“JOSE HILARIO LUCERO,

“Justice of the Peace.”

This affidavit was not signed by the plaintiff, nor is the purpose of making this affidavit very clear. It does not purport to be a complete affidavit, such as was intended to take the place of the original affidavit, and therefore must be considered as supplementary thereto. Its terms seem to indicate also that the property

replevied from the defendant was retaken by him, by some means not disclosed in the record, and this is borne out by the fact that while the jury find the property to be the property of the defendant (which is the effect of their verdict, "Not guilty"), there was no return of the property ordered; simply a judgment for costs. Counsel for defendant in error contend that there is no authority for cross replevin, but, as the record does not disclose any proceedings in cross replevin, we can not consider that question. The cause tried by the justice of the peace, so far as the record discloses, was the original replevin suit brought by Romero against Luna, and that cause is the one now pending in this court.

The record shows that application for leave to amend affidavit in replevin was made by plaintiff in error before any motion was made by the defendant in error to quash the writ and dismiss the appeal. The application for leave to amend was made orally, but, inasmuch as the motion for leave to amend was afterward reduced to writing, and on the eighteenth day of June, in open court, and by leave of the court, filed nunc pro tunc, it is evident that the amendments set out in the written motion were stated orally to the court at the time the motion was considered. The amendments desired were as follows: "By having the plaintiff sign the same, by stating the value of the property to be forty dollars, by describing the same, and stating that it was wrongfully detained by the defendant, and that plaintiff had a right to the immediate possession thereof." The amendment of process or pleadings in the district courts in cases originating in and brought into the district courts by appeal from the justices' courts is a matter of statutory regulation in this territory; therefore an examination of the provisions of the Compiled Laws on this subject will be necessary to a proper disposition of this assignment of

error. The provisions of the Compiled Laws of New Mexico upon the subject of amendments are as liberal as any we have found, and much more liberal than the statutes of most of the states and territories; hence decisions of other courts are of little value to us in considering this question. In fact, it is difficult to draw the line where the right of amendment ceases in causes brought into the district courts by appeal from the justices' courts. The trial of such case in the district court is a trial de novo. The district court does not exercise strictly appellate jurisdiction to the extent of becoming a court of errors, but it tries the case anew, untrammelled by the proceedings or decision of the justice's court, except to conform to the limited jurisdiction and practice provided by law for the court in which the cause originated. The transcript of a justice is of value only in so far as it advises the district court that the cause originated in the justice of the peace court, and that an appeal had been regularly taken to the district court; but the court will not examine or pass upon errors committed in the justice's court, nor be bound by any judgment that may have been rendered there. It conforms its practice to that of a justice's court, because the statute so expressly provides, regardless of the fact of a trial below. Section 1848 of the Compiled Laws, which became a law in 1853, is as follows: "All appeals from inferior tribunals to the district courts shall be tried anew in said courts, on their merits, as if no trial had been had below." An additional law on this subject was passed and took effect January 13, 1876. It did not in any way conflict with the former law, but enlarged its provisions as follows: "The case upon such appeal shall be tried de novo, and the same rules shall govern the district court in said trial that are prescribed for the government of justices' courts." Comp. Laws, 1884, sec. 2393. A still further provision upon this subject, and a part of the act of 1876, above

referred to, is quite explicit as to amendments in such cases. It is as follows: "All causes removed into the district court in pursuance of the foregoing sections shall be tried de novo, and the court shall allow all amendments which may be necessary in furtherance of justice in all cases appealed by petition, certiorari, or any ordinary mode." Comp. Laws, 1884, sec. 2443. This section undoubtedly refers to an action of replevin, originating in a justice of the peace court, and appealed to the district court, for by its terms it includes all cases originating before a justice of the peace. The only limitation upon the right of amendment is that it must be in furtherance of justice; and, if a proper application is made it is the duty of the court to allow it. This question has been presented to this court on several occasions, and there is an apparent conflict of authority, even in the decisions of this court, but a careful examination of the different decisions upon this subject discloses the fact that the conflict is only apparent, and not real, at least upon the question of allowing amendments in the district court in actions of replevin and attachment originating in the justices' courts. The case of *Barruel v. Irwin*, 2 N. M. 223, is evidently relied upon by the defendant in error as sustaining his view of the case; but an examination of that case shows a material difference from the case at bar. In that case the affidavit of replevin was substantially in the form prescribed by the statute, but it omitted to allege the value of the property, and to that extent it is the same as the case at bar; but in that case there was no application for leave to amend the affidavit, either in the justice's court or in the district court. The court held the affidavit to be fatally defective in omitting to allege value, but the court did not deny the right of amendment. On the contrary, we think the language shows a recognition of that right; but, inasmuch as there was no offer to amend, it was only referred to

incidentally; hence that case is not in conflict with the case of *Martinez v. Martinez*, 2 N. M. 464, where the question of the right to amend the affidavit in replevin was squarely presented to this court. This case is a more recent utterance of this court, and the decision, being written by the same judge who wrote the opinion in the case of *Barruel v. Irwin*, is further confirmation of the view that the court did not intend to deny the right of amendment in the former case. The case of *Martinez v. Martinez* and the case at bar are practically identical. In the case of *Martinez v. Martinez* the affidavit in replevin failed to properly describe the property, and allege that plaintiff was entitled to the possession thereof. No application was made to amend before the justice of the peace, but the case was tried on its merits. In the district court, on appeal, application was made for leave to amend the affidavit, but the court below refused leave to amend, and sustained motion to quash. This court held such refusal to be error, and reversed the case, with instructions to the court below to allow the amendment. The defendant in error denies the right of amendment, upon the authority of the following provision of the statute relating to the action of replevin: "The plaintiff, his agent, or attorney shall file an affidavit with the justice, stating that the goods and chattels are wrongfully detained by the defendant, and stating the value, and that he has a right to the possession thereof, and that every writ of replevin issued without such affidavit shall be quashed at the cost of the plaintiff." Defendant in error insists that this provision is mandatory, and that the writ must be quashed on motion; and the logic of the argument would be that, if the affidavit was defective to any extent, it would be fatal, and could not be cured by amendment. This contention can not be sustained, in view of the decision of this court in the case of *Martinez v. Martinez*. This very

statute was before it, and was considered by the court in rendering its decision in that case. The court says: "The fact that the statute expressly provides that if the writ be issued without the required affidavit it shall be quashed, adds nothing to the mandatory character of the statute, for that result would uniformly follow without any such provision. The provisions of the statute in regard to actions of replevin before justices of the peace and in regard to amendments on appeals from their courts in all cases being parts of the same act, must be construed together, and harmonized, if possible. This is not difficult. If the plaintiff inadvertently has made an insufficient affidavit for a writ of replevin, and takes no steps to rectify it, but rests his case thereon, the writ will be quashed as a matter of course. But, after discovering its insufficiency, if he applies at the proper time for leave to amend, there can be no objection to its allowance, if justice will be promoted thereby. It is quite evident from the record that the court below refused the amendment on the ground that it had no discretion to allow it under the statute. This was error. The refusal of the court to allow the affidavit to be amended was virtually a final disposition of the case in favor of the defendant, without a trial on its merits. There can be no doubt, from the facts appearing on the record, that granting leave to the plaintiff to amend his affidavit would have been in furtherance of justice, and that refusing it was an abuse of the discretion of the court below." *Martinez v. Martinez*, 2 N. M. 464.

It is urged in this case that the failure to allege the value of the property was jurisdictional, and could not be cured by amendment in the district court. One of the requirements of the statute is just as essential as the other; all of them are equally jurisdictional, according to the contention of the defendant in error; therefore, if one of the

AFFIDAVIT:
amendment:
jurisdiction.

requirements of the statute be omitted from the affidavit it is just as fatal as the omission of any other. When, therefore, this court held, as it did in the case of *Martinez v. Martinez*, that a defective affidavit in replevin might be amended in one particular, on application in the district court, the right of amendment in every particular was thereby established, and it is immaterial whether the defect was jurisdictional or not. But this court has held in a forcible entry and detainer proceeding before a justice of the peace (and the difference in the form of action is unimportant here) that an amendment should be allowed curing a jurisdictional defect where applied for, for the first time, in the district court. In the case of *Sanchez v. Candelaria*, 5 N. M. 405, it was held: "We think that if the application to amend had been made while the case was pending before the justice of the peace, it would have been the duty of such justice to permit the amendment to be made, and that the plaintiff's right to amend was not lost by the case having been appealed to the district court. If the justice of the peace was vested by law with jurisdiction to try such a cause, and the steps taken to invoke the jurisdiction were defective, such defect may be cured by an amendment in the district court." The limitations upon the right of an amendment indicated by above cited statutes and decisions are: First, that the amendatory fact must exist at the same time the suit is brought; and, second, the amendment desired must be in the furtherance of justice. It is clear that in this case all of the necessary amendatory facts set out existed at the time the suit was brought, and all of the amendments could have been made in the justice's court, and would have been allowed, doubtless, if applied for. The fact that they were not applied for or made will not warrant a dismissal of the cause in the district court if proper application is made in that court

to amend so as to cure the defects, if the amendments are in furtherance of justice. It can not be doubted that in view of the liberal legislation of this territory upon this subject the amendments applied for in this case were in furtherance of justice. In the trial of causes originating in the justices' courts the prime object of the law is to reach a trial upon the merits of the controversy between the parties, and this is true, also, of the district courts in the trial of such a case. Irregularities in the trial in the justices' courts are not to be allowed to prevent an adjudication of the cause on its merits, and amendments are therefore so liberally allowed as to enable the curing of all defects and irregularities in the proceedings of the informal and limited courts. The amendments applied for were intended to secure a trial de novo upon the merits, and, had the court allowed the amendments to be made, there would have been a trial upon the merits; but the refusal of the court to allow the amendments worked a dismissal of the cause without a hearing upon the merits. It would have been in furtherance of justice to have tried this case upon its merits, as was done in the justice's court, and thereby end the litigation. It is therefore apparent that the allowance of the amendments would have been in furtherance of justice.

The court below evidently held that the defects in the affidavit in replevin were jurisdictional, and therefore the court had no power to allow amendments. We are aware that there are decisions of many able courts in support of this view, but an examination of these authorities, we are convinced, will show that they are based upon statutes less liberal than those of this territory as to amendments, or by courts exercising strictly appellate jurisdiction in such cases. Section 2443, authorizing amendments in furtherance of justice, necessarily clothes the district courts with some discretion in determining what amendments are in furtherance of

justice. The court's discretion is not reviewable ordinarily, but where a court has a discretion to allow an amendment of a pleading or process, and refuses to exercise such discretion upon the ground of want of power, such refusal is error. *Sanchez v. Candelaria*, 5 N. M. 400; *Russell v. Conn*, 20 N. Y. 81. But the last utterance of the legislature on this subject resolves all doubts that may have heretofore existed as to the practice in such cases. Section 7, chapter 48, Laws, 1889, is as follows: "Although the jurisdiction of the justice of the peace may not affirmatively appear upon the face of the papers transmitted upon appeal, yet, if such jurisdiction actually existed in the justice of the peace before whom such cause was tried, it shall be the duty of the district court to allow any amendment necessary to set forth correctly the fact of jurisdiction, and no appeal shall be dismissed for any defect in the papers so transmitted; provided, the same can in truth be amended to correctly set forth the jurisdictional facts." This act was in force at the time this cause was heard below, but presumably was not called to the attention of the court, inasmuch as it is not referred to in the briefs of counsel. However that may be, this statute declares in terms what shall be the practice in such cases, and we find that this statute is in entire harmony with the conclusions of this court as announced in the cases of *Martinez v. Martinez*, 2 N. M. 464, and *Sanchez v. Candelaria*, 5 N. M. 405. We are thus led to the conclusion that the second assignment of error is well taken, and works a reversal of the case. The judgment of the lower court will be reversed, and the cause will be remanded, with directions to the lower court to allow the affidavit in replevin to be amended, and proceed with the case as the law directs.

LEE and FREEMAN, JJ., concur. O'BRIEN, C. J., dissents.

[No. 521. August 5, 1892.]

**TERRITORY OF NEW MEXICO, APPELLEE, V.
WILLIAM DAVIS, APPELLANT.**

CRIMINAL LAW—MURDER—CHALLENGE TO ARRAY OF JURY—APPEAL.—

On appeal, in a prosecution for murder, submitted on the record, a challenge to the array of the jury must be in writing, and state specifically the ground of the challenge; otherwise an objection to the array appearing in the record will not be considered.

ID.—ERRORS—BILL OF EXCEPTIONS.—Nor will alleged errors in rulings on evidence be considered, on appeal, in such case, where there is no bill of exceptions.

APPEAL, from a judgment convicting defendant of murder, from the Third Judicial District Court, Grant County. Judgment affirmed.

The facts are stated in the opinion of the court.

A. J. FOUNTAIN and **BELL & WRIGHT** for appellant.

EDWARD L. BARTLETT, solicitor general, for appellee.

LEE, J.—The record in this case does not properly present any question for the consideration of the court. The appellant was convicted, at a special term of the district court for the county of Dona Ana, of the crime of murder in the third degree, and sentenced to the penitentiary for the period of seven years, from which judgment he appealed to this court, filing the required affidavit that the appeal was not taken for delay, etc. Under the provisions of the statute entitling him to have his case reviewed by this court, which operated as a supersedeas or stay of proceedings in said court below, the clerk of the district court, as required by statute in such cases, certified and returned the record

to this court. No counsel appearing on behalf of the appellant, the solicitor general, on the part of the territory, submitted the case to this court upon the record. There is no bill of exceptions bringing up the evidence or presenting exceptions taken to the rulings of the court below,

MURDER: challenge to array of jury: appeal.

but, as the defendant in a criminal case in this territory is not required to assign or join in error, we have carefully reviewed the proceedings, and find but one objection made, and that is, as the record shows, that the defendant, before the impaneling, entered a challenge to the array of the jury, but it does not appear for what reason. The grounds of challenge to a jury must be specifically stated, and the challenge to the array must be in writing. 1 Thomp. Trials, section 98. The record shows that an exception was taken to the ruling of the court in not sustaining the challenge, but it does not show that the challenge was in writing, or the grounds upon which it was made; therefore, there is nothing for this court to consider in regard to it. A motion for a new trial was made: First, for the reason that the verdict was contrary to law; second, that it was contrary to the evidence; third, that the court erred in its rulings as to the admission of improper evidence; and, fourth, in overruling the challenge above referred to as to the legality of the jury. It

ERRORS: bill of exceptions.

does not appear in the record wherein the verdict was contrary to the law, and, as we have not been able to discover any error, we can not sustain that objection. As the evidence has not been brought up by a bill of exceptions, and is not before us, we can not consider any objections in regard to any ruling that may have been made in regard to it, and, as this covers all the other objections that appear in the motion, it leaves nothing for us to consider. The judgment will be affirmed.

O'BRIEN, C. J., and FREEMAN, J., concur.

[No. 522. August 5, 1892.]

**TERRITORY OF NEW MEXICO, APPELLEE, v.
JOHN A. MURRAY, APPELLANT.**

THE FACTS of this case are substantially the same as those in *Territory v. Davis*, page 452, ante, and this case was affirmed for the same reasons stated in that case.

APPEAL, from a judgment of conviction of defendant, from the Third Judicial District Court, Grant County.

BELL & WRIGHT for appellant.

EDWARD L. BARTLETT, solicitor general, for appellee.

LEE, J.—The facts in this case relating to the manner of its appeal and its present status in this court are substantially the same as those in the case of *Territory v. Davis* (the opinion in which is filed at the same time with this). For the reasons stated in that opinion, and on the state of facts set forth therein, they coinciding exactly with the situation of this cause, we can find no error in the record, and the judgment of the court below must be affirmed.

O'BRIEN, C. J., and FREEMAN, J., concur.

[No. 504. August 8, 1892.]

SYLVESTER CHAVEZ AND VENESLADO CHAVEZ, PLAINTIFFS IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT IN ERROR.

CRIMINAL LAW—LARCENY—CATTLE BRAND—EVIDENCE OF OWNERSHIP.—

In a prosecution, on indictment, for larceny of an animal, it may be alleged and proven that another than he in whose name the brand was recorded was the owner of the brand or the animal, at the time of the larceny. Under section 57, Compiled Laws, a brand is prima facie evidence, not of the ownership of the person in whose name it is recorded, but of the ownership of the person "whose brand it may be;" the statute contemplating a possible change of ownership of such brand after record. If the brand was recorded, it is still prima facie evidence of the ownership of the true owner at the time of the larceny; and evidence offered to prove who was the "true owner" is not subject to the objection that it was proving ownership of the brand by parol evidence.

ID.—REASONABLE DOUBT—INSTRUCTIONS.—An instruction, in such case, that "the presumption of law is that the defendants are innocent, and this presumption continues with them until it is overcome by evidence, beyond a reasonable doubt, that they are guilty as charged," and that "a reasonable doubt is not a mere possibility of a doubt, but it must be a reasonable doubt growing out of all the evidence and circumstances in evidence in the case," was a sufficient instruction as to what a "reasonable doubt" is, and without prejudice to defendants.

ERROR, from a judgment convicting defendants of larceny, to the Second Judicial District Court, Valencia County. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for plaintiffs in error.

Huning's testimony that he was the owner of the circle H brand is in violation of the statutes. Comp. Laws, 1884, secs. 54, 55, 57, 64, 65.

The sections of the statutes cited above provide that "no evidence of ownership by brands shall be permitted in any court in this territory unless the brands shall have been recorded;" that in all suits at law and in equity, and in all criminal proceedings, when the title of any stock is involved, the brand on an animal shall be prima facie evidence of ownership of the person whose brand it may be, if the brand has been duly recorded, and that proof of the right to use the brand shall be made by a certified copy of the record. The statute also requires that all sales of animals, with certain exceptions, shall be evidenced by a bill of sale, and prescribes a penalty for its violation; and a sale attempted to be made in violation of the statute is void and passes no title. *Miller v. Ammon*, 12 Sup. Ct. Rep., June 20, 1892, p. 884.

An allegation in the indictment that the property is the property of A. is not sustained by proof that the property belongs to A. & Co., a partnership of which A. is a member. *People v. Frank*, 1 Idaho (U. S.), 200; *State v. McCoy*, 14 N. H. 364; *People v. Ah Sing*, 19 Cal. 598; *State v. Lyon*, 47 N. H. 416; *Com. v. Trimmer*, 1 Mass. 476.

The definition given by the court of a "reasonable doubt" was not a proper legal definition. *People v. Lachanais*, 32 Cal. 434; *People v. Ast*, 44 Cal. 288; *Com. v. Webster*, 5 Cush. (Mass.) 295.

EDWARD L. BARTLETT, solicitor general, for the territory.

Under section 57, Compiled Laws, a recorded brand is only prima facie evidence. It was competent for the territory to show that the ownership of the brand had changed.

Proof of ownership by brands is not permitted unless the brands shall have been recorded, which was done in this case by Louis Huning for the firm of L. & H. Huning. Sec. 54, Comp. Laws.

The instruction of the court below as to what a "reasonable doubt" is, was a sufficient definition. *State v. Reed*, 62 Me. 142, 143.

McFIE, J.—The defendants were indicted at the September term, 1891, of the district court for Valencia county, charged with the larceny of a steer, property of one Louis Huning. Upon a trial had at the February term, 1892, a verdict of guilty was rendered as to both defendants. The defendants were sentenced to imprisonment in the territorial penitentiary for one year each, and have appealed to this court to secure a reversal of the judgment of the court below. The ownership of the property was alleged to be in one Louis Huning. On the trial the prosecution offered in evidence a record of the "Circle H" brand, which showed that L. & H. Huning owned the brand at the time it was recorded. Louis Huning was placed upon the stand, and permitted to testify, over the objection of defendant's counsel, that he was the owner of the "Circle H" brand at the time the larceny was alleged to have been committed. Upon the trial there was proof of the ownership of the animal, in addition to the brand, which appellants practically admit was sufficient to warrant a conviction by the trial jury, if believed by them. It was not error for the court to permit the witness Huning to testify that he was the present owner of the brand introduced in evidence. The brand was recorded as required by law, and, while it was *prima facie* evidence that L. & H. Huning were owners of the brand at the time of record, it was not conclusive evidence of ownership in them. A brand is personal property, and may be sold and transferred as other personal property; and the law does not prohibit proof of the true ownership of a recorded brand where the brand has been sold and become the property of another than the person in whose name it was

recorded. Section 54, Compiled Laws, provides that "no evidence of ownership by brand shall be permitted in any court of this territory unless the brand shall have been recorded as provided by this act." This section simply provides that, where a brand is relied upon to prove ownership, it is not proper evidence for that purpose unless it is recorded. Section 57 provides that, "when the title of any stock is involved, the brand on an animal shall be prima facie evidence of the ownership of the person whose brand it may be; provided, that such brand has been duly recorded as provided by law. Proof of the right of any person to use such brand shall be made by a copy of the record of the same, certified to by the county clerk of that county or any county in which the same is recorded, under the hand and seal of office of such clerk."

There was no objection to the introduction of the brand in evidence, as it had been recorded as required by law. The only objection was that the witness Hunting could not testify that he was the owner of the brand at the time the offense was alleged to have been committed. Under section 57, above
LARCENY: cattle
brand: evidence
of ownership. quoted, the brand is made "prima facie evidence of the ownership of the person whose brand it may be," not necessarily of the person in whose name it is recorded, but "whose brand it may be;" evidently contemplating the sale and transfer of the ownership of such brand after record. But, if the brand had been recorded, it is still prima facie evidence of ownership in the true owner at the time the cause of action arose in a civil case, or at the time the offense was committed in a criminal. The evidence of Hunting was not subject to the objection that it was proving ownership of a brand by parol evidence. If oral evidence alone had been offered of the brand and its record, without producing the record of the brand, it

would be subject to that objection, in a case where proof of ownership by brand alone was relied upon; but that was not done in this case. To have excluded this testimony would have been to prevent proof of the true ownership of the animal, and defeat the prosecution for the offense, for the reason that, in a case of a second prosecution alleging ownership in L. & H. Huning, the defendants could defeat prosecution by placing Louis Huning on the stand, and proving by him that he was the real owner of the brand, and therefore of the animal. If such is the law, the owner of a purchased brand could be convicted of the larceny of his own animals bearing that brand. The brand law does not require that the ownership of an animal must be proved by the brand itself. Ownership may be proved by flesh marks, or any other proper evidence, in the same way as if no brand law was in existence. Proof by brand under our statute is only an additional method of proving ownership, and is especially applicable in the case of range animals. *J. J. Wolf v. State*, 4 Tex. App. 332; *Fisher v. State*, Id. 181; *Hutto v. State*, 7 Tex. App. 44. But this evidence was properly admitted, for the reason that it was competent evidence to aid the prosecution in proving the identity of the animal in question. *Johnson v. State*, 1 Tex. App. 332, 333; *Poage v. State*, 43 Tex. 454. It is not to be presumed that the brand was offered for the sole purpose of proving ownership, because upon the face of the record it appeared that the ownership was *prima facie* in L. & H. Huning, which did not tend to support the allegation of ownership in Louis Huning; but we so conclude from the further reason that evidence of ownership, regardless of the brand, was offered and admitted. Whether it was offered to prove ownership or not is immaterial; being competent evidence to aid the prosecution in establishing identity of the animal stolen, it was admissible.

Section 64 of the Compiled Laws, providing for giving and receiving bills of sale in case of animals, is not in point in this case. This is a criminal proceeding, and the enforcement of the criminal laws of the territory is not dependent upon the failure or refusal of an individual to give or receive a bill of sale. "Title and ownership," within the meaning of the brand law, was not necessarily involved in this case. Bishop says: "Where property belongs to a business firm, the ownership must be laid in all; and, if one of them has such a separate possession as to give him a special property by reason thereof, it will not be ill to lay the ownership in him alone." 2 Bish. Crim. Proc., sec. 723; *Samora v. State*, 4 Tex. App. 508; *State v. Wilson*, 6 Oregon, 428.

At the close of the case for the prosecution, appellant's counsel moved the court to direct the jury to find the defendants not guilty, on account of the variance between the allegations and the proof. The motion was based upon the fact that the record of the brand introduced in evidence showed upon its face that L. & H. Huning were the owners of the brand. This objection was not well taken, and the court properly refused to direct the jury to find the defendant's not guilty. If the law provided that the record of brands, when introduced, should be conclusive evidence of title, there would be force in the objection, but the law does not so provide. The brand would be but *prima facie* evidence, at best, and would not prevent the prosecution from introducing other evidence of the true ownership of the animal at the time the offense was committed, regardless of the brand. Such proof would not be varying the terms of a written instrument, under the circumstances of this case. There was proof outside of the brand, tending to show the title of the property to be in Louis Huning, that was proper to go to the jury,

and, therefore, the court properly refused to direct the jury to find for the defendants.

The refusal of the court to give the following instructions, asked for by the appellants, is urged as error: "First. In this case the title and ownership of the steer is alleged in the indictment to be in Louis Huning, and evidence tending to show the title and ownership of the steer, about which the witnesses have testified, is in the firm or copartnership of which Louis Huning is a member, would not be sufficient to warrant the conviction. Second. The court instructed the jury that the record of the brand of L. & H. Huning, offered in evidence in this case, taken in connection with the testimony of the witnesses that the steer alleged to have been stolen being branded with that brand, established *prima facie* that the steer alleged to have been stolen was the property of L. & H. Huning, and was not the property of Louis Huning, as charged in the indictment; and, unless the jury believed from the evidence that the *prima facie* case so made has been proved by other evidence in the case, they should find the defendants not guilty." The first of these instructions counsel for appellant did not insist upon in the argument, and we think it was properly refused, under the evidence in this case. But counsel insists that the court should have given the second instruction, and thereby informed the jury that the legal effect of the introduction of the brand in evidence was to establish a *prima facie* case of ownership in L. & H. Huning. We think this instruction was properly refused by the court. The instruction was calculated to impress upon the minds of the jurors the importance of this brand as a means of proving title, whereas the brand was evidently offered for the purpose of proving the identity of the animal in question. By specifically referring to the brand, this instruction was calculated to lead the jury into disregarding the evidence by brand for any

other purpose than proving the title, and was liable to mislead them under the evidence in this case. But whether these instructions were proper or not it is unnecessary for us to consider, for the reason that the court fully instructed the jury upon the law of the case, as presented by the evidence, and especially upon that part of the case to which the refused instructions apply; and in such case, although instructions may be correct, it is not error to refuse them.

The court gave the following instructions at the conclusion of its general charge: "There is an allegation in the indictment that the property alleged to have been stolen was the property of Louis Huning. If you should find that the evidence is not sufficient to satisfy you that this is the fact, you should find the defendants not guilty, the same as you would any other material allegation that is charged in the indictment which it is necessary for the territory to prove beyond a reasonable doubt." This instruction was sufficient to prevent the jury from believing that they could convict the defendant if they believed the evidence showed title to be in L. & H. Huning, and not in Louis Huning. It did not single out, as did the instruction asked for by defendants' counsel, the evidence relative to brands, and thereby attach undue importance to that portion of the testimony, nor was it proper to do so. The jury was plainly informed that they should not convict the defendants unless they believed from the evidence, beyond a reasonable doubt, that the title and ownership was in Louis Huning, as charged in the indictment, and this was sufficient. The court is not required to give instructions in the language of counsel as a special charge, if the court gives proper instructions upon the same subject in its own language.

It is objected that the court erred in its general charge upon the subject of reasonable doubt. The

instruction given is as follows: "The presumption of law is that the defendants are innocent, and this presumption continues with them until it is overcome by evidence, beyond a reasonable doubt, that they are guilty as charged. A 'reasonable doubt' is not a mere possibility of a doubt, but it must be a reasonable doubt growing out of all the evidence and circumstances in evidence in the case." Counsel say that this instruction is, in effect, that a "reasonable doubt" is a "reasonable doubt." It is difficult to define a "reasonable doubt" in any plainer terms than the words themselves import. Such definitions must result in simply stating the same proposition in a different form of words, and words which are perhaps no more clearly understood. This instruction could not have prejudiced the defendants. The jury were plainly informed that they would not be warranted in convicting the defendants if they had a reasonable doubt of their guilt, after a full consideration of all the evidence, and this is sufficient instruction upon that point, without any attempt on the part of the court to define what a "reasonable doubt" is. To attempt to define a "reasonable doubt" is very much like attempting to define a definition, and the better practice is not to attempt to define a "reasonable doubt" beyond the words themselves. The judgment of the court below will be affirmed.

O'BRIEN, C. J., and SEEDS, J., concur. FREEMAN, J., did not hear the arguments, and LEE, J., having tried the case below, took no part in this case.

[No. 503. August 9, 1892.]

**FREDERICK FAULKNER, PLAINTIFF IN ERROR, V.
TERRITORY OF NEW MEXICO, DEFEND-
ANT IN ERROR.**

CRIMINAL LAW—MURDER—EVIDENCE—VERDICT.—In a prosecution, on indictment, for murder in the first degree, where the only evidence offered for the defense was the testimony of the accused, which was contradictory and evasive, and the evidence for the prosecution was such that the jury could not escape the conclusion, beyond a reasonable doubt, of the guilt of the defendant, unless they refused to believe the testimony of the witnesses for the territory, they were justified, as the judges of the credibility of the witnesses, in returning a verdict of conviction.

ID.—CONTINUANCE—SECTION 2051, COMPILED LAWS, 1884.—A motion for a continuance, made on the thirteenth day of the term, on the ground that it was not made earlier, because the defendant "hoped to obtain the necessary testimony," stated a conclusion and not a fact such as contemplated by section 2051, Compiled Laws, requiring such motions to be made on the second day of the term, and, if after that day of the term, that they shall state facts constituting an excuse for such delay.

ID.—CONTINUANCE—AFFIDAVIT—SECTION 2049, COMPILED LAWS, 1884.—A motion for a continuance, alleging that defendant had been unable to obtain testimony to show that he was nearly all his life unbalanced; that he had been in three different insane asylums; that he had been unable to learn the address of his relatives, in order to secure their assistance in obtaining a copy of the records of the asylums showing he had been confined there; that such testimony was necessary to show that affiant was wholly insane and irresponsible for his acts, and that he was unable to go to trial without the testimony of the wardens of such asylums, who would testify to the fact of his insanity,—was not sufficient: First. Because it was not shown wherein the copies of the records of such asylums would be legally competent. Second. Because the statement as to the other testimony was not such a statement of facts as could legally go to the jury, and which the prosecution could admit. Third. Because the affiant did not allege facts to show that he was insane at the time of the commission of the crime. Fourth. Because no facts were alleged as to defendant's insanity, to which the wardens of such asylums could testify, as required by section 2049, Compiled Laws.

ID.—COMPULSORY PROCESS FOR ATTENDANCE OF WITNESSES—PRESUMPTION.—Where it does not appear from the record that defendant asked for compulsory process to compel the attendance of witnesses, it will not be presumed that such process was refused.

ID.—MURDER—INSTRUCTIONS—SECTION 2054, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.—Section 2054, Compiled Laws, making it the duty of the trial judge in all cases to instruct the jury as to the law of the case, does not require the court to give instructions as to murder in the second and third degrees where the evidence only shows murder in the first degree. The statute refers solely to the case as made by the evidence.

ID.—MURDER—PLEA, INSANITY—BURDEN OF PROOF.—On a prosecution for murder, where the defense was insanity, the burden of proof was on defendant to introduce sufficient evidence to at least produce in the minds of the jury a reasonable doubt as to his sanity and guilt.

ID.—MURDER—REASONABLE DOUBT—INSTRUCTIONS.—An instruction in such case, that the law does not require the jury to be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied on to establish defendant's guilt, that it was sufficient to warrant such conviction if the jury, taking the testimony altogether, were satisfied beyond a reasonable doubt that defendant was guilty, was a proper instruction, under the evidence, and not misleading.

ID.—TESTIMONY OF DEFENDANT—INSTRUCTIONS.—Nor was it error for the court to instruct the jury, in such case, where the defendant testified in his own behalf, that they might take into consideration defendant's special interest in the case, in determining what weight should be given his testimony.

ID.—IMPEACHMENT OF WITNESS—INSTRUCTIONS.—In such case, a charge to the jury that one of the modes of impeaching a witness was to show that the witness had, at other times and places, made different statements from those made on the witness stand, and that if they believed the witness had done so, as to any material matter, it was their exclusive province to determine to what extent such fact tended to impeach his memory or credibility, or detracted from the weight which might otherwise be given to his testimony, was also a proper charge, and without prejudice to defendant. *Territory v. Romine*, 2 N. M. 114.

ID.—NEWLY DISCOVERED EVIDENCE—NEW TRIAL.—On a motion for new trial on the ground of newly discovered testimony, where the testimony, if it had been produced, would only have tended to contradict the witness, and his testimony might have been dispensed with, and still have left sufficient to justify the verdict, the court did not err in refusing to grant the application.

ERROR, from a judgment convicting defendant of murder in the first degree, to the Fourth Judicial District Court, San Miguel County.

The facts are stated in the opinion of the court.

J. LEAHEY and MIGUEL SALAZAR for plaintiff in error.

The court erred in overruling the motion for a continuance. Comp. Laws, N. M., sec. 184. See, also, secs. 1847, 2049, 2050, Comp. Laws, N. M.; Territory v. Kinney, 3 N. M. (Gil.) 657; Territory v. Davis, 10 Arizona Rep. 359; 7 Mass. 205; People v. Lee, 8 Cal. 685.

If the district court erroneously refuses a continuance, a bill of exceptions must be taken. Leroy Cotton v. State, 32 Tex. 615.

The court erred in refusing defendant an opportunity to obtain process to compel the attendance of witnesses in his behalf. Comp. Laws, N. M., sec. 673; State v. Lurch, 5 Oregon, 408.

The court erred in omitting to instruct the jury fully as to the law of the case. Comp. Laws, N. M., sec. 2054.

The court erred in failing to charge the jury as to the law of the case applicable to murder in the second degree. Session Laws, 1891, chap. 80, sec. 5.

The instructions given failed to state the law in its application to the facts correctly and fully. Crawford v. State, 4 Caldwell (Tenn.), 190; Keener v. State, 18 Ga. 194; State v. Brainard, 25 Iowa, 572; Stewart v. State, 1 Ohio, 66; Brown v. State, 23 Tex. 195; Anderson v. State, 1 Tex. App. 730.

Where there are different degrees of an offense, the law of each degree, which the evidence tends to prove, should be given. Washington v. State, 36 Ga. 222; Williams v. State, 2 Tex. App. 271;

State v. Bryant, 55 Mo. 75; State v. Conley, 39 Me. 78; Foster v. People, 50 N. Y. 598; Hudson v. State, 40 Tex. 12; People v. Quincy, 8 Cal. 89; O'Connell v. State, 18 Tex. 343; People v. Byrnes, 30 Cal. 206; People v. Dunn, 1 Idaho, 75; Territory v. Nichols, 3 N. M. (Gil.) 104.

The general terms in which the instructions were given were calculated to mislead the jury by inducing them to suppose that the form of the indictment was such as would authorize a conviction of murder in the first degree only. Beaudien v. State, 8 Ohio St. 634-637.

An instruction which is wrong can not be corrected by an instruction which is right. Achy v. State, 64 Ind. 57-61.

The court must submit to the jury the consideration of every degree of the crime charged, and the exclusion of any grade is reversible error. Territory v. Nichols, 3 N. N. (Gil.) 104.

The court should instruct the jury what circumstances will, in law, reduce a homicide from murder to manslaughter, and leave them to apply the law to the facts in evidence. People v. Culloghn, 6 Pac. Rep. 49.

The court erred and misled the jury in giving the only two grounds mentioned, and then charging them that "in all other cases such killing is criminal and felonious." Beaudien v. State, 8 Ohio St. 634; Moria v. State, 28 Tex. 698; May v. People, 8 Col. 217; State v. Achy, 64 Ind. 59; Cotton v. State, 32 Tex. 615, 626; State v. Floyd, 6 Jones (N. C.), 392; Bonie v. State, 19 Ga. 1; State v. Johnson, 3 Jones (N. C.), 266.

It is no answer to the objection that an erroneous instruction was given for the prosecution to show that in another part of the charge, another instruction was given in which the law was correctly stated. People v. Bush, 3 Pac. Rep. (Cal.) 590.

Misleading instructions to the prejudice of the party complaining are sufficient to set aside the verdict. *Missouri Pacific R'y Co. v. Pierce*, 5 Pac. Rep. 378.

The burden of proof in a criminal case is always upon the state, and never shifts from the state to defendant, and the making out of a prima facie case against the defendant does not shift the burden to the defendant. *State v. Mahn*, 25 Kan. 186.

If testimony be introduced tending to show the insanity of the accused, then the burden of proof is upon the state to show his sanity. *State v. Reddick*, 7 Kan. 152; *State v. Nixon*, 32 Id. 213; *Guetig v. State*, 66 Ind. 105; *Leache v. State*, 22 Tex. App. 279; *Walker v. State*, 102 Ind. 502, 508; *Burkhard v. State*, 18 Tex. App. 599, 622; *Emery v. Hoyt*, 46 Ill. 258.

Sanity is presumed, but when insanity is once established it is presumed to continue. *Leache v. State*, Tex. App. 1886.

Where the defendant sets up that he was insane about the time the act was committed, he declares that he had no criminal intent, which is an indispensable element in every offense. 1 Bish. Crim. Law, secs. 375, 381; see, also, Id., secs. 301-310, 366, 367.

The doctrine is now becoming general that insanity is not an issue by itself, but like any other matter in rebuttal, it is involved in the plea of not guilty, upon which the burden of proof is on the prosecution. 1 Bish. Crim. Proc., secs. 1050, 1051; *Wright v. People*, 4 Neb. 407; *State v. Smith*, 53 Mo. 267; *State v. Crawford*, 11 Kan. 32.

In cases depending upon circumstantial evidence, in order to warrant a jury in convicting, they must be satisfied, beyond a reasonable doubt, of every essential fact or circumstance necessary to the conclusion of guilt. *Bressler v. People*, 3 N. E. Rep. 522, 528; *Lehman*, 18 Tex. App. 174; see, also, *Stark, Ev.*

[9 Am. Ed.], sec. 856; *Scott v. State*, 19 Tex. App. 325; *Burrill's Cir. Ev.*, 733; *Com. v. Webster*, 5 Cush. (Mass.) 295, 317; *Sumner v. State*, 5 Black. (Ind.) 579; *People v. Phipps*, 39 Cal. 326, 333; *People v. Anthony*, 56 Id. 397, 400; *Johnson v. State*, 18 Tex. App. 385, 398; *Clair v. People*, 10 Pac. Rep. (Col.) 799.

The metaphor of the "chain" in instructions, taken in connection with the remainder of the instructions and the evidence, is inaccurate and misleading. *Leonard v. Territory*, 7 Wash. Ter. 872, 878; *Marion v. State*, 20 N. W. Rep. 290, 294, 16 Neb. 359, 394; *Clair v. People*, 9 Col. 122, 123.

The court erred in its instruction casting discredit upon the testimony of the accused. *Com. v. Pease*, 137 Mass. 576; *Buckley v. State*, 62 Miss. 705; *Hogsett v. State*, 40 Miss. 522; see, also, *Wright v. Com. of Ky.*, 2 S. W. Rep. 905; *People v. Petmecky*, 99 N. Y. 415, 421; *Anderson v. State*, 104 Ind. 467, 472.

It is not the law, even in civil cases, that the testimony of a party must be corroborated in order to be believed by the jury. *Prowattain v. Tindall*, 80 Pa. St. 295; *Buckley v. State*, 62 Miss. 705, 706; *Hartford v. State*, 96 Ind. 461, 466; *Pratt v. State*, 56 Ind. 179; *Unruh v. State*, 105 Id. 117, 123; *Bird v. State*, 107 Id. 154; *People v. Arnold*, 40 Mich. 710; *Comp. Laws, N. M.*, sec. 2493.

The court erred in admitting extra judicial statements and admissions made by defendant, who afterward, on the trial, testified that he was innocent. *Harmon v. State*, 3 Tex. App. 51; *Com. v. Williams*, 105 Mass. 62, 68; see, also, *People v. Barrie*, 49 Cal. 342; *Beery v. United States*, 2 Col. 186; *State v. Grant*, 22 Me. 171; *Com. v. Chabcock*, 1 Mass. 144; *People v. McMahon*, 15 N. Y. 384, 386; *State v. Staley*, 14 Minn. 105; *Barnes v. State*, 36 Tex. 356; *State v. Phelps*, 11 Vt. 116, 121; *Price v. State*, 18 Ohio St.

418; *State v. Wentworth*, 37 N. H. 196, 218; *Miller v. People*, 39 Ill. 457; *State v. Freeman*, 12 Ind. 100; *Com. v. Mitchell*, 117 Mass. 431.

It is the duty of the court whenever the verdict is against the weight or preponderance of the evidence to set it aside and grant a new trial. *Union Pacific R. R. v. Diehl*, 6 Pac. Rep. 566; *Daily v. State*, 10 Ind. 536; *Roach v. Gilmer*, 4 Pac. Rep. 221.

It is a well established rule of law that evidence discovered since the trial, which was not produced before from any lack of diligence, and which is relevant and material, and not cumulative, or introduced for the purpose of impeaching a witness, is ground for new trial. *People v. Corty*, 3 Pac. Rep. (Cal.) 609; *Lindley v. State*, 11 Tex. App. 283; *Turnley v. Evans*, 3 Humph. (Tenn.) 222; *Smith v. Matthews*, 6 Mo. 600; *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Ables v. Donley*, 8 Tex. 331; *Grace v. McArthur*, 76 Wis. 644; *Wilcox Silver P. Co. v. Barclay*, 48 Hun (N. Y.), 54; *Morse v. State*, 108 Ind. 599.

Of late new trials are liberally granted in furtherance of justice, and should be awarded more freely in criminal than in civil cases. *State v. Tomlinson*, 11 Iowa, 401; *Owens v. State*, 35 Tex. 361; see, also, *Falk v. People*, 42 Ill. 331; *Landers v. State*, 35 Tex. 359.

EDWARD L. BARTLETT, solicitor general, and L. C. FORT, district attorney, for territory.

SEEDS, J.—The plaintiff in error was tried at the last April term of the San Miguel district court upon an indictment, found by the grand jury of Colfax county, charging him with murder in the first degree. The jury found him guilty, and, in accordance with the law, the court adjudged him to suffer death by hanging. From the judgment of that court he has appealed to this court, and it now becomes our duty to pass upon the errors which he has assigned and urged

upon us as a reason for the reversal of that judgment. It will be necessary to state somewhat fully the facts as shown by the record and the bill of exceptions in order to appreciate the assignment of errors which he has made. He was indicted by a grand jury of Colfax county upon the twenty-fifth of March, 1892, for the murder of one James Lannon in that county upon August 9, 1891. Upon the following day, to wit, March 26, 1892, he was arraigned in open court, and, stating that he was too poor to procure counsel, the court appointed M. Salazar, Esq., and J. Leahy, Esq., to defend him. He then admitted that his true name was "Frederick Faulkner" instead of "Frank Woods" or "Frank Decker." On the twenty-eighth of March he came into court, attended by his counsel, and pleaded not guilty. At the same time he asked for a change of venue because of the local prejudice, which was granted, and his case was sent to San Miguel county for the April term of the district court, and set for trial on the third Monday of that term, which was the eighteenth day of April. Upon that day, it being the thirteenth day of the term, and the day set for his trial, he came into court, attended by his counsel, and made application for a continuance upon various grounds. The court took the application under immediate consideration, and denied it. The jury was impaneled, and the evidence submitted, and on the nineteenth day of April the jury returned their verdict of guilty, as charged. On the twentieth of April the defendant filed his motion for a new trial, assigning six classes of errors, as reasons for granting the same. The motion was denied. A motion in arrest of judgment was then made and overruled, whereupon the court passed sentence of death.

If the evidence introduced upon the part of the territory, as exhibited by the bill of exceptions, was

legally before the jury, then it proved the following state of facts: That on or about the first of August, 1891, the defendant and a man by the name of James Lannon were in Trinidad, Colorado; that the man (James Lannon) was possessed of two fair sized sorrel horses, a wagon, and some camping utensils, and also some money; that the defendant was in search of work; that about the seventh of August the defendant left Trinidad in the company of a man answering to the description of James Lannon, in a wagon, with a camping outfit, and drawn by two sorrel or gray horses; that on or about the night of the seventh of August two persons were seen camping upon the Trinchera, a small river in Colfax county, New Mexico, and that they had with them two gray horses, but the size was not positively stated; that upon the next day, near this place, but a few paces away in the bushes, where the two persons were seen camping with the gray horses, was found a dead man wrapped up in a blanket, and bound with wire; that the back part of his head was mashed in, as if with a blunt instrument, while there were two gashes upon either side of his face, as though made by the blade of an ax. A few feet away was found an ax with blood upon the handle, and upon a trial it was found that the ax blade fitted perfectly into the gashes upon the face. The description of the dead man, as far as it went, though not very minute, answered to that of the man Lannon. Upon the day the dead man was found, and early in the morning, the defendant was seen in Folsom, Colfax county, New Mexico, some twelve or thirteen miles from the place where the dead man was found, and he had in his possession a team of sorrel or gray horses, with a lumber wagon and camping outfit. Upon the night of the following day the defendant was arrested in Colorado, about one hundred and fifty miles from the place where the man was found dead. He was camping, and

MURDER: evi-
dence: verdict.

had with him the team of sorrel horses, the wagon, and the camping outfit. There were also found in the wagon two valises, from one of which were taken a postal card and letters. The postal card was addressed to James Lannon. The defendant claimed to the officers who arrested him that he had bought the team and wagon, and the owner had given him a bill of sale for the same, but that he had sent it to his mother, and had forgotten the name of the vendor. He told the officer further that he had left Trinidad with an old gentleman, and that they had camped together "there" that night, and that he had slept on the one side of the wagon and the old gentleman upon the other, and that two Mexicans came there, and camped with them, and that the next morning they presented a Winchester at him, and told him to hitch up the team and pull out, and that he supposed the old gentleman was killed. On the thirteenth of August the defendant was brought before a justice at Folsom, and there waived examination, but, in answer to questions which were propounded to him by the justice, said that he did not know the man's name; that he did know it, but had forgotten it. He said that "he was present when the man was killed; that a lot of Mexicans came there in the morning when he was hitching up, putting the harnesses on the horses, and the first thing he knew the old man was dead, and they threwed down their guns on him, and told him to leave the country just as fast as 'he could.'" Sometime after this there was an examination before another justice at Springer, in Colfax county, of one Bob Carr, accused of the murder of the man Lannon. The defendant herein was the prosecuting witness for the territory, and there testified substantially as follows, as testified to by a witness who heard him in that case: He said that his name was Woods. "He said that he and this old man, Lannon, went into camp that evening on the Trinchera, New

Mexico, and about 9 o'clock in the evening Robert Carr rode up on horseback. He was at that time in bed. The old man was still around the fire, and he said Carr came over to him and said, 'Get up out of here, and take off my saddle.' He said he got up, and took it off, and went right back to bed, and he heard Carr and the old man, Lannon, talking, and he turned over in bed, and looked down in the direction of where they were, and the next thing he knew anything about was early in the morning,—I believe he stated about 4 o'clock,—when Carr came to him, and says, 'Get up out of there, and get into this wagon and start.' He said the team was hitched up, ready to go. All he did was to get up, load his bed up, throw it into the wagon, and, just about the time he was ready to go, he said Carr picked up a watch, and pitched it over in the wagon bed, and Carr said, 'Go on; don't stop;' and he said he started at that. Then there was a whole lot of talk about his stopping at the grocery store," etc. The man Carr was a witness in this case, and corroborated the above testimony as to what the defendant testified to before the justice in Springer. He also testified that he did not know the man, Lannon; that he had never seen him; that he was not on the Trinchera upon the night of the killing, and had never seen the defendant with Lannon. The testimony also shows that the defendant, after his arrest, had been searched a number of times; that upon the first search there was found upon him some pass books and some money; that upon the search made about two months after his arrest there was found upon him a watch.

This was the testimony of the territory. The defendant testified in his own behalf substantially as follows: That his right name was Fred Faulkner, but that his mother had been married a second time to a man by the name of Woods, and that he went by that name; that he was in the insane asylum at Pueblo,

Colorado, during the latter part of July, 1891, but had escaped, and come to Trinidad in search of work; that there he met and became acquainted with Bob Carr, and agreed with him to go out as a cook for a surveying party; that upon the same day, but later, he, the defendant, went down the street, "and I seen him talking to the old man, and" afterward "he gave me an introduction to him, but not by the name he is here called;" that he remained a day or two longer in Trinidad, visiting the Salvation Army, of which he was a member, when Carr started him and the old man off, telling him he would come later, but, as he owed his hotel bill, that he didn't wish to give the appearance of leaving just then; that about 8 or 9 o'clock at night he overtook them at their camp; that Carr ordered him to get up and feed his horse, which he did; that being very tired, he immediately returned to his bed, and fell into a sound sleep; that the next morning Carr woke him up, told him to put the things into the wagon, and that they would start; that he asked Carr where the driver was, and that he replied, "Drive on; he is all right;" that he was going to ask him some other questions, but that he pulled out his gun, and told him to "go on;" that he drove ahead to Folsom, where he obtained something to eat by purchasing it, Carr at the time being on the outer edge of the town; that, at Folsom, Carr told him to drive on, and that he would be right after him, and if he stopped he was liable "to get one of these; and he pulled his gun and showed it to me;" that he kept on the road until arrested. He gave a somewhat different version of the arrest by the deputy sheriff, and denied point-blank all the testimony given by the territory's witnesses as to his various admissions. He stated that he had been in an asylum in Illinois, Missouri, and Colorado, and that he was at times subject to fits. This was the substance of his evidence upon the direct examination. His cross-exam-

ination, while modifying the direct but little, was far from disingenuous. He refused to answer pertinent questions, and persisted in evading answers, and was constantly making endeavors, by evasions and impertinent remarks, to withdraw the attention of the counsel from the question propounded. If the evidence then was all rightfully before the jury, we can not see how that body could escape the conclusion, beyond a reasonable doubt, that there had been committed a most foul murder, and that this defendant was the author of such crime, unless they had refused to believe the witnesses for the territory, and had placed implicit credence in the story of the defendant. The jury have said by their verdict that he was guilty. They are the judges of the credibility of the witnesses, and we see nothing upon this record to convince us that their judgment upon that question was not absolutely correct, even had we the authority to inquire into it. Were there, then, errors in the actions of the trial judge in the refusing of a continuance, in the admission of testimony, or in the giving of instructions? The defendant makes eight assignments of errors, and, at the risk of making this opinion somewhat lengthy, but justifying it by the gravity of the case, we will consider those errors seriatim.

1. The defendant filed a motion based upon affidavit for continuance upon the very day set for his trial, which day was the thirteenth day of the term. By sec-

tion 2051, Compiled Laws, 1884, all motions for continuance must be made

CONTINUANCE:
section 2051,
Compiled Laws.

“on the second day of the term, if it is certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered; and, if made after the

second day of the term, the affidavit must state facts constituting an excuse for the delay in making it." There have been no facts stated showing any excuse for the necessity of filing this motion upon the day of the trial. It is true that the defendant's counsel made an affidavit, which had for its purpose to show that due diligence had been used in the effort to obtain certain testimony, and for an excuse for making the application upon the day of trial, but it was insufficient. The reason given for not earlier making the application was "because he hoped to obtain the necessary testimony." That statement, if anything, was a conclusion, and not a fact such as the law contemplates. The facts which raised the hope in the counsel's mind that he would have been able to obtain the testimony should have been the basis for his excuse for the delay in not sooner filing his application for a continuance. If, however, there was real merit in the affidavit for the continuance, in a matter of so great gravity as this, we would not hesitate to inquire fully into the application, and grant a new trial, if there had been an abuse of discretion on the part of the trial court, or had he overlooked the mandatory condition of the statute applicable to continuances. The law unquestionably is that, if the legal requirements in the application for the continuance have been fully met, irrespective of the truth of the facts alleged, the continuance must be granted, unless the opposite side will admit that the witnesses, if present, would testify to the facts stated in the application. Section 2050, Compiled Laws, 1884; Territory v. Kinney, 3 N. M. 369. But this application is legally insufficient. In his affidavit the defendant says that he

has been unable to obtain testimony to show that his mind has for nearly all his life been unbalanced, and that he had been in three different insane asylums; but he nowhere states any facts which show reasonable grounds of

CONTINUANCE:
affidavit: section
2049, Compiled
Laws.

belief that such testimony will be forth coming at the next term of the court, nor efforts, constituting due diligence, which he had used to obtain such evidence at the term at which he was tried. He further avers that he has been unable to learn of the address of his relatives, in order to get their assistance in the way of sufficient money to obtain a copy of the records of the asylums, showing that he has been incarcerated there, as aforesaid, and such other testimony as may be necessary to show that affiant has at times been wholly insane and irresponsible for his acts." This averment is clearly insufficient: First. There is no showing wherein the copies of the record of the asylums would be legally competent. Second. The statement as to the "other testimony" is not such a statement of facts as could legally go to the jury, and hence the territory could not admit it. Then, too, he only seeks to show by that testimony that he was insane at times, but not at or about the time when the alleged crime was committed, and yet, as we understand the rule, the testimony as to insanity must go to show that condition of mind at the time of the commission of the act. He further avers that he is unable to go to trial because he did not have present important and material witnesses, to wit, the keepers and wardens of the before mentioned asylums, who would testify to the above facts as to his insanity. This is insufficient, if for no other reason than that there are no facts as to his insanity alleged, to which these witnesses could testify. The statute provides that the application for a continuance must state "what particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witnesses by whom such facts can be duly proved." Section 2049, Compiled Laws, 1884. He has failed to distinguish between fact and conclusion,—in truth, he has utterly failed to

allege any fact which could legally be of any assistance to him. There was, therefore, no error upon the part of the court in refusing the continuance.

2. It is alleged that there was error in refusing the defendant compulsory process, by which to compel the attendance of witnesses upon his behalf. The defendant was certainly entitled to this right and, if he has been refused the right, it was error. Section 673, Compiled Laws, 1884. The record presented to us must be presumed to be absolutely correct, in the absence of any showing that it is wrong; and there is a further presumption, in the absence of a showing to the contrary, that the action of the trial court was correct in all matters. When the defendant relies upon an alleged irregularity of the court or jury, the burden is upon him, not only to show it, but also to show he was prejudiced thereby. *Thomason v. Territory*, 4 N. M. 150-154, and cases cited. Now there is no showing that this defendant ever asked for any process; hence it can not be supposed that it was refused him. This right does not contemplate that the government must go to the accused, and ask him what he desires; present him with process already signed in blank for him to fill up as he might wish, and then have the record show that fact. It simply means that if the accused wishes the aid of the government, then all the legal agencies are at his command, but that he must ask for them. This he has failed to do. The presumption then certainly is that he did not wish those agencies, and he can not, therefore, complain.

3. It is alleged that there was error in the failure of the court to fully instruct as to the law of the case.

The statute provides that it is the duty of the judge in all cases to instruct the jury as to the law of the case. Section 2054, *Comp. Laws*, 1884. It is contended that, as there are

COMPULSORY process for attendance of witnesses: presumption.

MURDER: instructions: section 2054, *Compiled Laws*.

three degrees of murder under our statute, it is the duty of the court to give instruction as to all of them; and as in this case the court only instructed as to the first degree, there was error. But this contention is manifestly wrong under the authorities. "The law of the case" has reference solely to the case as made by the evidence. If there was any evidence before the jury upon the second or third degrees, then it would have been the duty of the court to have instructed as to those degrees. But a careful reading of that evidence, as presented to us by the record, fails to show any evidence upon those degrees. Either the evidence proved murder in the first degree or nothing; hence the instruction of the court was correct. *Thomason v. Territory*, 4 N. M. (Gil.) 154; *Territory v. Nichols*, 3 N. M. (Gil.) 103; *Territory v. Romine*, 2 N. M. 114; *Territory v. Romero*, Id. 474; 9 Am. and Eng. Encyclopedia Law, 741, and cases cited. The counsel seemed to urge that it was the duty of the court to instruct upon all the degrees of murder, because the jury might have thought there was something in the case bearing upon those degrees, although not deducible from the fair import of the evidence. But an answer to this is that the jury ought never to enter into speculation as to what might be. They must not, either in favor of life or against it, read into words proof which in no fair sense can be legally found in them, or to imagine that there may have been a condition of facts lurking behind them; and it would be erroneous for a court to encourage the jury in speculating or imagining a possible state of facts by giving instructions which are not warranted by a fair consideration of the whole of the evidence. The court in this particular has a duty upon it to listen to the evidence, and to determine, not what facts are proven, but, if the facts testified to are proven, to what degree or degrees may they legally apply. This he does, of

course, at his peril of making a mistake. Territory v. Young, 2 N. M. 93.

4. It is assigned as error that the court in its ninth instruction upon the question of justifiable and excusable homicide stated the law incorrectly. The fault complained of is, not that the law so far as given was not correct, but that it became erroneous by failing to state the whole law upon the subject. In other words, that the court erred in naming certain classes of persons, the legal defense of whom is justifiable, and in not naming other classes mentioned in the statute. If, however, the evidence only applied to one class of persons, then it was only necessary to instruct as to that class. This upon the reason of the rule as applicable to instruction as to degrees of crime. But a satisfactory answer to this assignment of error is that there is not one iota of evidence, to which any instruction upon self-defense could apply, found in the record. If, then, there was any error at all, it was not that assigned, but it was in giving any instruction whatever. Such error, however, could not have confused or misled the jury, and in any case was favorable to the plaintiff in error, and he can not complain.

5. The fifth assignment of error is as to various instructions upon certain law propositions in the case.

MURDER: plea,
insanity: burden
of proof. The first is as to the defense of insanity. The only testimony upon the question of insanity was that of the defendant, and was, in substance, that he had been in three different asylums for various lengths of time, but he nowhere testifies that while in them he was insane. He testified that after he left one of the asylums his mind "was all right at spells," by which he meant, unquestionably, that it was all right except when he had spells; for, in reply to an interrogatory as to the character of these "spells," he says they were "fits." In

reply to the question, "Have you been subject to these spells since [leaving the Missouri asylum], and about how often?" he answered: "Sometimes I have two or three a month, sometimes more, and sometimes only one." There was no evidence that after leaving the asylum at Pueblo up to the time of trial, which was fully eight months, that he had ever had an attack of these fits. He testified as to his actions previous to and at the time of the killing, and never intimates that during that time he had any attack of these fits, though he had sworn in his affidavit for a continuance that he believed that at the time the crime was committed he was insane. With this evidence before the jury, the court gave the following instruction as to the defense of insanity: "You are instructed that the law presumes every person of mature years to be sane, and responsible for his acts, until the contrary be shown by the evidence; and, when insanity is relied upon as a defense to an alleged criminal act, the burden of proof is upon the defendant to show, by the evidence, that he was affected by insanity, or by some insane delusion, at the time of the act, to such an extent that he did not know what he was doing, or that he did not know that what he was doing was wrong; and in this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased in manner and form as charged in the indictment, then, to establish a defense on the ground of insanity, the burden of proof is on the defendant to show by the evidence that at the time of committing the act he was laboring under such a defect of mind and reason that he did not know the nature of the act he was doing, or, if he did know, that he did not know that he was doing what was wrong." The objection to this instruction is that it wrongly states the law as to the burden of proof when the defense of insanity is an issue. The defendant contends that sanity is just as

essential as any other necessary ingredient of a crime, and that, as the territory has the burden to prove all the material allegations of a crime, and sanity being one of them, it is therefore necessary for it to assume the burden of proving it. But this is not an exact statement of the law. Every person accused of crime is presumed to be sane, and that legal presumption is all the proof required of the territory under the burden. If nothing is advanced by the defense upon the issue, the fact of sanity is proven beyond a reasonable doubt. If, however, the defense insists upon insanity as an excuse for the defendant's action, then "the burden of proof is upon him to establish it." 2 Thomp. Trials, sec. 2524. This statement of the law does not mean, though, that the burden is of such a nature as to necessitate a proof beyond a reasonable doubt, nor necessarily that the proof must be by a preponderance of evidence, though some courts have so held; but it means that when the defense of insanity is set up the burden is upon the defendant to submit sufficient evidence to at least produce in the minds of the jury a reasonable doubt of the guilt of the accused, under the instructions, that he must have been insane when he committed the deed. *Id.* The instruction in question simply enunciates this rule. This holding in no way alters the general proposition that the burden is upon the territory to prove the crime beyond a reasonable doubt. When the territory rests its case, it has done so, or the defendant must be acquitted. When the defendant then says, "I was insane when I did the act," he has the burden of proving sufficient to introduce a reasonable doubt as to that fact, and the jury should be so instructed that they may not fall in the error of thinking that the mere suggestion of insanity is sufficient to acquit, because they have been previously instructed that the territory has the burden of proving the material allegations beyond a reasonable

doubt. Thompson says in his work upon Trials, at the section above quoted, that "the defense of insanity, from its very nature, confesses the commission of the act;" and this is the law. But the defendant insists that he did not commit the act; hence, from his standpoint, the defense was not in the case; but whether under the evidence as to the alleged insanity, or the position taken by the defendant, we think that there was no error in the instruction of the court.

6. This case was one which rested upon purely circumstantial evidence, and, among others, the court gave the following instruction: "You are further instructed that the rule of law requiring you to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient to warrant such conviction if, taking the testimony altogether, you are satisfied beyond a reasonable doubt that the defendant is guilty." This in-

MURDER: rea-
sonable doubt:
instructions.

struction is given in Sack. Instruct. Juries, 483, and is held to be correct in *Houser v. State*, 58 Ga. 78; *Jarrell v. State*, 58 Ind. 293; *State v. Hayden*, 45 Iowa, 11; and *Bressler v. People*, 117 Ill. 422. Upon the other hand, very respectable courts have held that the portion, at least, of the above instruction above quoted, as to each link not requiring to be proven, is, if not bad law, at least very liable to mislead a jury, and it ought not to be so given. *Marion v. State*, 16 Neb. 349; *Clare v. People*, 9 Colo. 122; *Leonard v. Territory*, 2 Wash. T. 381. In the Colorado case, *supra*, the court did not have the testimony before it, and it is not quite certain that the latter portion of the above instruction—"It is sufficient to warrant such conviction, if, taking the testimony altogether, you are satisfied beyond a reasonable doubt

that the defendant is guilty"—was the instruction which they passed upon. The danger in such an instruction is that the jury will understand the term "link" to mean the same as a "material fact," and possibly overlook the proof as to such fact, which would be clearly wrong. But the jury had been fully instructed as to the necessity of believing beyond a reasonable doubt that each and every material fact had been proven, and they could not have been in any way misled by this instruction, viewing it in the light of the evidence before us in the record. We are of the opinion that, under the evidence in this case, there was no error in this instruction.

The court instructed the jury that the defendant was a competent witness, and in judging of his credibility, and the weight to be given to his testimony, "the fact that such witness is specially interested in the result of the action or of your deliberations may be taken into account by you, and you may give such testimony only such weight and credit as you think it fairly entitled to receive under all the circumstances of the case, and in view of the special interest of such witness in the result of the action." It is insisted that

TESTIMONY of
defendant:
instructions.

this casts discredit upon the defendant's testimony, and is an invasion of the province of the jury. To this view of the instruction we can not assent. As a statement of a principle by which to gauge the weight of the testimony and the credibility of the witness it is correct, and the only possible error which could be assigned would be in the specific mentioning of the defendant. But it nowhere says the jury must disregard the testimony, or that they may do so, or what weight they should give to his testimony, and it is hard to see wherein he was prejudiced by the mere mention of the fact that his testimony must be judged by the same rule as that for other witnesses. In the case of Ter-

ritory v. Romine, this court, while discountenancing the instruction, says that the following in a murder trial is not error: "It will be proper for you to consider the fact that he is the defendant, and that the greatest possible temptation is presented to him to testify in his own favor, if he is really guilty." 2 N. M. 114. We think it better, while giving the law so as to fully cover the testimony of the defendant, to refrain as far as possible from calling direct attention to his evidence; for it is conceivable that there may be cases in which it might prejudice the jury. In this case it was hardly possible that such could have occurred. By another instruction the jury were told that, "if you believe from the evidence that the defendant, as a witness, * * * has willfully sworn falsely in this trial as to any matter or thing material to the issue in this case, then you are at liberty to disregard his entire testimony, except so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial." It is urged that this is erroneous, because it is not the law in civil cases, much less in criminal, that the testimony of a party must be corroborated in order to be believed by the jury. While this is true, we fail to see the applicability of the objection to the instruction before us. The court does not say that the defendant's testimony, as such, must be corroborated, but, if they believe that he has willfully sworn falsely to material matters, that they are at liberty to disregard that portion unless corroborated. The instruction was favorable to him rather than otherwise, as it protected testimony favorable to him from other witnesses, even though he might have discredited it by his false swearing, if the jury found that he had sworn falsely. That this is a correct instruction is fully sustained by adjudicated cases. Some judges have directed juries to disregard such testimony, and the appellate tribunals have said it was error. In this

case, however, the judge gave them the law, and said they were at liberty to disregard it unless corroborated. *Jones v. People*, 2 Colo. 351; *Mead v. McGraw*, 19 Ohio St. 55; *Senter v. Carr*, 15 N. H. 351; 10 Crim. Law Mag., p. 167, sec. 10.

IMPEACHMENT
of witness:
instructions.

Upon the question of impeaching witnesses the judge charged the jury that one of the modes of so doing was to show that the witness sought to be impeached had, at other times and places, made statements at variance with those made by him upon the witness stand, and if they believed that the defendant, as to any material matter, had done so "then it is your exclusive province to determine to what extent such fact tends to impeach either his memory or his credibility, or detracts from the weight which ought otherwise to be given to his testimony;" and in a second instruction upon the same point he charged them that if from the evidence they believed that the defendant had so made statements as to material matters at other times and places at variance to what he stated upon the witness stand, "then you are instructed that these facts tend to impeach either the recollection or truthfulness of the witness, and you should consider these facts in estimating the weight which ought to be given to his testimony." This is alleged to be error solely upon the ground of its prejudicing the defendant as discrediting his testimony, but in no place does the trial judge assume or intimate that contradictory statements have been made as a fact, while there was evidence that such statements had been made. If, now, the jury believed that contradictory statements had been so made as a fact, then it was only proper that they should be told how to deal with that fact, and what its legal consequences were. That the law was properly stated hardly admits of question. "The credit of a witness may also be impeached by proof that he has

made statements out of court contrary to what he has testified at the trial." But these must be as to matters relevant to the issue. 1 Greenl. Ev., sec. 462. The only possible objection which might be urged to this instruction is the calling the jury's attention to the defendant's testimony. But under the principle of the decision of *Territory v. Romine*, 2 N. M. 114, we can not see that the defendant can have suffered.

We have thus briefly considered all the errors assigned as to the instructions, and have failed to find any error which calls for a reversal. The instructions, as a whole, were fair, just, and favorable to the defendant. They were quite lengthy, but at all times kept before the jury's mind the leading rule of criminal evidence, that they could not find the defendant guilty unless they believed beyond a reasonable doubt that all the material allegations which the territory was bound to prove had been proven; and, after a careful and earnest consideration of the evidence, we are unable to see how a jury could honestly and intelligently come to any other conclusion than it did. We can not refrain from saying that we think that too often hypercritical constructions are placed upon instructions by counsel, in the earnestness of their contention, which could not have entered into the minds of the jurors. Language often, by its form of expression, grows in the mind of a person who studies it with a purpose of seeing just what is in it, until the idea evolved is far different than that which its author or those to whom it was addressed imagined. Jurors do not usually enter into a critical analysis of the language of an instruction, but are guided by the first impression which accompanies it, and that impression, in the most cases, is the one which the judge intended that they should have. In the instructions complained of upon the ground that they tended to discredit the defendant's testimony, because he was directly named,

this is evident. The judge never had the thought of so doing, as it would have been improper, and it is not supposable that it had any such impression upon the jurors.

7. A number of witnesses testified to certain admissions or confessions which the defendant made while in the custody of the officers. They were made to the officers. It is claimed that it was error to admit them because made under duress. But there was no evidence whatever that they were so made. The defendant when upon the stand did not claim that they were made under duress. His testimony was that they were never made; that they were pure inventions. That was a question for the jury. That they were made voluntarily, if made, must be conceded, and hence they were admissible. Whart. Crim. Ev., sec. 649; 1 Greenl. Ev., sec. 219, et seq.

8. It is lastly urged that it was error in the court refusing a new trial upon the showing of newly discovered evidence. The defendant made an affidavit in which he stated that he had discovered important, relevant, and material evidence in his behalf, in that two women would testify "that, two days before the killing of Lannon, Carr visited them, and stated to them that James Lannon had lots of money, and that he, Carr, was going to get it before the end of three days." This testimony, if produced, would only tend to contradict Carr, and nothing more. The testimony of Carr could be dispensed with, and yet leave sufficient to justify the finding of the jury. Saying nothing as to the very questionable sufficiency of the affidavit as to allegations of diligence in finding this evidence, and the truth as to the other allegations as shown by the defendant's own evidence, yet we think the showing is not sufficient to authorize us to disturb the verdict. The granting of a new trial is a matter resting largely

NEWLY discovered evidence:
new trial.

in the discretion of the trial court, and ought not to be disturbed, unless clearly erroneous, or unless, in a criminal case, the court feels that the evidence produced would change the verdict. 16 Am. & Eng. Encyclopedia of Law, 503. It is true that in a criminal case the appellate court will examine more carefully the use of the discretion made by the trial court, and will and ought to reverse its holding when there is the least valid presumption that a new trial would result differently than the one appealed from. But we believe beyond a reasonable doubt, upon the evidence in this case, that the result would not be different in a second trial, even with the new evidence. There might be one chance or more, based upon the law of probabilities, in the defendant's favor, but we can not overlook that right and justice which the good order of the territory demands for its protection, by leaving the plain path of the law, to allow an accused to speculate upon the probabilities even in the case where the judgment is death. The defendant had a fair and impartial trial, his rights were duly protected by court and counsel, the jury acted without precipitation or any evidence of passion, and their verdict was unquestionably right and just. The many errors assigned have not been considered with the thoroughness which they might have been, for, on account of the day fixed for the execution being so near, and there being no legal way of changing the day, it was necessary to arrive at a conclusion as soon as possible, taking into consideration the importance of the case and the need of arriving at a correct conclusion. It has only been attempted to announce the law as a fact upon the various points raised, not to elaborate the arguments from which the law issued.

There being no error found in the action of the trial court, the judgment will be affirmed.

McFIE, LEE, and FREEMAN, JJ., concur.

[Nos. 517, 495, 496. August 9, 1892.]

J. S. MARTIN, PLAINTIFF IN ERROR, v. JOHN W. TERRY ET AL., DEFENDANTS IN ERROR; AUGUST KIRCHNER ET AL., PLAINTIFFS IN ERROR, v. J. M. C. CHAVEZ ET AL., DEFENDANTS IN ERROR; SAME, PLAINTIFFS IN ERROR, v. ISADORE FERRAN, DEFENDANT IN ERROR.

PRACTICE ON APPEAL—ASSIGNMENT OF ERRORS—WRIT OF ERROR—DISMISSAL.—On a motion for dismissal of an appeal or writ of error and affirmance of judgment, for failure to comply with section 2189, Compiled Laws, providing that, in default of making and filing an assignment of errors on or before the first day of the term to which the cause is returnable, "the appeal or writ of error may be dismissed, and the judgment affirmed, unless good cause for such failure be shown," the sudden and unexpected impoverishment of an appellant or plaintiff in error is not "good cause," within the meaning of the statute, for failure to comply therewith, and will not be heard as an excuse for such failure.

ID.—RULE 25, SUPREME COURT—ASSIGNMENT OF ERRORS—WRIT OF ERROR—DISMISSAL.—On such motion, where the appellant or plaintiff in error has made an assignment of errors, and incorporated it in a transcript containing a statement of the cause and brief, and had the same properly filed, but has failed to file the assignment, written on a separate paper, as required by rule 25 of the supreme court, the appeal or writ of error will be dismissed.

ID.—ASSIGNMENT OF ERRORS—FILING OF SEPARATE PAPER—AFFIDAVIT.—Where, on a motion to set aside an order dismissing an appeal and affirming judgment, an affidavit of counsel filed, though it does not show a technical compliance with rule 25 of the supreme court, shows that the assignment of errors was made on a separate paper and filed in the clerk's office; that the same was placed in the hands of the printer to be copied in the brief, and the brief shows that the same was copied as required by the rule; and affiant states that he supposed, and had good reasons to believe, the same had been forwarded with the record to the clerk of the supreme court,—Held: This was sufficient, under the provisions of the statute, as showing an honest effort to comply with the rule, and the order of dismissal will be set aside.

ERROR, from a judgment for defendants in each case, to the Fifth Judicial District Court, Socorro County. Motion to dismiss writ of error and for affirmance of judgment in each case, sustained. Motion in case number 517 to set aside order of dismissal, sustained.

The facts are stated in the opinion of the court.

CATRON & COONS and KELLEY & SNIFFEN for plaintiff in error, J. S. Martin; and W. B. SLOAN for plaintiffs in error, August Kirchner et al.

J. G. FITCH for defendants in error, John W. Terry et al.; and N. B. LAUGHLIN for defendants in error, J. M. C. Chavez et al., and Isadore Ferran.

ON MOTION TO AFFIRM.

PER CURIAM.—Motions in the foregoing causes are made by the defendants in error and appellees to affirm the judgments below on the grounds that assignments of error were not made and filed in accordance with the provisions of section 2189, Compiled Laws, 1884, and of rule 25 of this court, adopted in pursuance of said section. The facts in the last two cases are identical. No assignments were made or filed, or attempted to be made or filed, in either of them, on or before the first day of the present term. No sufficient excuse is shown for such failure. The sudden and unexpected impoverishment of plaintiffs in error is merely stated or suggested by counsel. Admitting it to be true, it hardly furnishes a pretext, and certainly no “good cause,” for such negligence. The portion of the section cited, applicable to the present contention, reads: “On appeals and writs of error, the appellant and plaintiff in error shall assign errors on or before the first day of the term to which

ASSIGNMENT of
errors: writ of
error: dismissal.

the cause is returnable; in default of such assignment of errors, the appeal or writ of error may be dismissed, and the judgment affirmed, unless good cause for such failure be shown." Rule 25 of this court, adopted January 29, 1887, provides that "all assignments of error required by section 2189 of Compiled Laws of 1884 shall be written on a separate paper, and filed in the cause, and shall also be copied into the brief of the appellant or plaintiff in error, and the clerk shall enter the fact of such filing on the record." It is needless to

RULE 25, supreme court: assignment of errors: dismissal.

remark that it would look like a judicial encouragement of uncertainties and delays in the prosecution of suits to refuse, in the light of the facts before us, to grant the motions in the last two causes. The facts in the first case are somewhat different. In that plaintiff in error made out an assignment of errors, but incorporated it in a transcript containing statement of case and brief, and had same properly filed; but he has not filed such assignment written on a separate paper, as required by rule 25. The rule evidently requires two things of the party alleging error: First, that he state each error relied upon in separate paragraphs, written on separate paper; second, that the same be copied into the brief of appellant or plaintiff in error. Observance of the rule is not difficult. The rule itself is not unreasonable, and it tends to promote uniformity in appellate proceedings. If a party to-day be permitted to disregard one portion of it, to-morrow another party may claim the right to disregard the other portion. Duty requires us to enforce obedience to all of it. No excuse is offered for failure to file the errors assigned on a separate paper. It follows that the motions must be granted, and the several writs of error and appeal in the three causes submitted be dismissed, and the judgments affirmed. This policy is in accord with previous decisions of this court. *Lamy v. Lamy*, 4 N. M. 29; *Deemer v. Faulk-*

enburg, 4 N. M. 149; Lamy v. Lamy, 4 N. M. 291. The writs and appeal are dismissed, and the judgments below affirmed.

ON MOTION TO SET ASIDE DISMISSAL.

LEE, J.—On motion to set aside an order dismissing appeal and affirming judgment below. On a prior day of the present term of this court, an order was made dismissing the appeal and affirming the judgment below, for the reason that the appellant had failed to comply with the twenty-fifth rule of this court, which provides that all assignments of error required by section 2189 of the Compiled Laws shall be written upon separate papers, and filed in the cases, and shall also be copied into the briefs of appellants or plaintiffs in error, and the clerk shall enter the fact of such filing on the records. The appellant now moves to set aside the order then made of dismissal in said cause, and to have said cause set down for hearing, and files an affidavit as to compliance with or reasons for failing to comply with the rule, which affidavit is as follows:

ASSIGNMENT of
errors: filing of
separate paper:
affidavit.

“Territory of New Mexico, County of Socorro—ss.: J. S. Sniffen, being duly sworn, on his oath deposes and says that he is one of the attorneys for J. S. Martin, plaintiff in error, and that the case was in the hands and management of W. E. Kelley, who had acted as the attorney for J. S. Martin, aforesaid, and that the entire case had been left to the management of said Kelley, to take and perfect the appeal of the same to the supreme court; that this affiant had every reason to believe that the said cause was regularly appealed to the said court; and that the transcript and all necessary papers had been filed. Affiant further says that on or about the thirteenth day of June, 1892, he was first informed that up to that date nothing had been done by the said Kelley to perfect the appeal.

Affiant says that on said date he caused a transcript of the record of the said cause to be made by the clerk of the district court of the Fifth judicial district, and to be forwarded as soon as possible to the clerk of the supreme court; that, in order to secure the transcript of the same in time for filing, the said clerk was obliged to work night and day; that affiant prepared his brief and assignment of errors, and placed the same in the hands of the printer, and the same was completed on the fourteenth day of June, 1892, and were by the said W. E. Kelley, with the transcript, delivered to the clerk, to be forwarded as aforesaid. Affiant further says that the assignment of errors was written on a separate piece of paper, and it was the intention of affiant to have the same forwarded for filing in said cause, but in the hurry to forward the same in time the said assignment of errors was omitted; that the same was left in the printing office, and has since been destroyed, with other copy. Affiant says that this affidavit is not made for the purpose of hindering and delaying the said cause, but that justice may be done.

“Subscribed and sworn to before me this thirtieth day of July, 1892.

“J. S. SNIFFEN,

“Attorney for J. S. Martin, Plaintiff in Error.

“W. H. RYERTS, Notary Public.”

While this court is disposed to adhere strictly to the rule as before laid down, and the same will be enforced in all cases, where good reasons are not shown for such failure, as required by statute, the affidavit presents a very different question from that which was before the court on the former ruling. While the affidavit does not show a technical compliance with the rule, yet it shows that the assignment of errors was made out on a separate paper, and filed in the clerk's office, and that the same was placed in the hands of the printer to be copied in the brief; and the

brief shows that the same was copied as required by the rule, and the counsel swears that he supposed and had reasons to believe that the same had been forwarded with the record to the clerk of this court. This would appear to be a substantial showing, under the provision of the statute, of an honest effort to comply with the terms of the rule. Therefore the judgment dismissing the appeal and affirming the judgment below will be vacated and set aside, and the cause set down for hearing.

O'BRIEN, C. J., and SEEDS and McFIE, JJ., concur.

[No. 471. August 15, 1892.]

ELLA LUTZ AND MARION A. LUTZ, PLAINTIFFS IN
ERROR v. ATLANTIC & PACIFIC RAILROAD
COMPANY, DEFENDANT IN ERROR.

TRESPASS ON CASE—LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW SERVANT.—It was not the intention of the legislature, in the enactment of sections 2308–2310, Compiled Laws, to change the common law rule exempting a master from liability to his servant for the negligence of a fellow servant.

ID.—INJURY TO RAILROAD EMPLOYEE—INSTRUCTION TO FIND FOR DEFENDANT—EVIDENCE.—In an action of trespass on the case against a railroad company for damages for the negligent killing of plaintiff's former husband, an employee of the company, where the evidence was of such character that, had the jury found for the plaintiff, it would have been the duty of the court to set aside the verdict, the court did not err in directing a verdict for the defendant.

ID.—INJURY TO RAILROAD EMPLOYEE—NEGLIGENCE OF FELLOW SERVANTS—PROXIMATE CAUSE—LIABILITY.—Where, in such action, the declaration alleged that the defendant failed to furnish the deceased, who was in the defendant's employ as a freight conductor, with a properly constructed car such as was ordinarily used upon its road, but instead thereof wrongfully, negligently, and over deceased's protest, furnished him with an unsafe box car without doors or windows in the ends, or cupola in the top, through which approaching danger might be seen and averted, which deceased was induced to use upon the promise of defendant's agents that he would be furnished with a

proper car in a very short time, but which defendant failed to do; that, through the negligence of its servants, one of defendant's trains ran against the rear of the train driven by deceased, broke the same into splinters, and deceased was struck by its locomotive and flying splinters, and died from the effect of the injuries thus received; and there was no allegation that the accident was the result of deceased's not being able to see the approaching danger by reason of the absence of the windows and cupola in the car,—Held, on demurrer: The proximate cause of the accident was the negligence of the fellow servants operating the second train, not the failure of defendant to furnish a proper car. The action can not therefore be sustained. Nor could it be sustained if it were conceded that the proximate cause was the joint negligence of the deceased's fellow servants and the failure of defendant to furnish, within a reasonable time, a proper car.

ERROR, from a judgment for defendant, to the Second Judicial District Court, Bernalillo County. Judgment affirmed; FREEMAN, J., dissenting.

The facts are stated in the opinion of the court.

BERNARD S. RODEY for plaintiffs in error.

C. HAZELDINE and H. L. WALDO for defendant in error.

SEEDS, J.—This is an action of trespass on the case, brought by the plaintiffs in error against the defendant corporation, for the statutory damages for the negligent killing of the plaintiff's (Ella Sykes') former husband by the defendant. The declaration contains three counts. The first count declares upon the negligence of the fellow servants of the decedent, he being a conductor upon a freight train of the defendant. The second count declares upon the negligent, careless, and improper selection of the decedent's fellow servants by the defendant, and the retention of said fellow servants in its employ after full knowledge of their incompetency, and alleges that the killing was caused by reason of said incompetency. The third count declares upon the negligent conduct of the

defendant in furnishing the decedent with an improper, unsafe, and defective caboose, knowing at the time that it was unsafe and defective, but which the decedent used under protest, and only under and by reason of the promise made by the defendant to the decedent that he should be provided with a safe one in a very short time; and because of the negligence and carelessness of the decedent's fellow servants upon another train of the defendant's, running into and destroying the caboose in which the decedent was, by reason of which he was killed. To the declaration, and each count thereof, the defendant filed a demurrer. The court sustained the demurrer to the first and third counts, and overruled it as to the second; whereupon the defendant answered as to the second count. A jury was called, and after the plaintiff's evidence was in and they had rested, the court, upon motion of the defendant, instructed it to find for the defendant. The plaintiffs sued out a writ of error, and allege error in sustaining the defendant's demurrer to the first and third counts, and in instructing the jury to find for the defendant upon the trial under the second count.

1. The first count declared upon the negligence of the deceased's fellow servants, whereby he lost his life. Unless changed by statute, it is now the unquestioned law that damages can not be recovered for injuries sustained by reason of the negligence of fellow servants. Negligence of such servants of a common employer is part of the risk which public policy requires that an employee take in entering upon a service in which there are fellow servants. *Priestly v. Fowler*, 3 Mees. & W. 1; *Murray v. So. Car Railroad Co.*, 1 McMul. 385; *Farwell v. Boston & W. Railroad Co.*, 4 Metc. 49; *Pierce, R. R.* 358; 2 Ror. R. R. 1183; 1 Lawson Rights, Rem. & Pr., section 301; Beach, Contrib. Neg. section 102; *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478.

TRASPASS on case:
liability of mas-
ter for negligence
of fellow servant.

Beach in his work objects strenuously to the reasoning upon which this rule of law is based, but admits that it is now universal, unless when changed by statute, as it has been in some jurisdictions. We are content to adopt the rule as the law for this jurisdiction, whatever may be the theoretical objections to it, based upon what may be thought to be purely logical grounds, until such time as the legislature sees fit to change it.

But the plaintiffs contend that the rule as above enunciated has been changed. The question for decision then is, has it been changed? Sections 2308-2310 Compiled Laws, New Mexico, provide, in substance, that, when "any person" comes to his or her death by reason of the negligence or carelessness or criminal action of an agent, officer, or other employee of a railroad company, that his or her representative may recover of the company \$5,000. The contention is that "any person" in this statute has reference to any one whomsoever who may be killed, and hence includes one who may be a fellow servant. By further reading the statute it will be found that the words "any person or passenger" are used, which would seem, however, to throw doubt upon the real meaning of the words "any person," rather than to more definitely explain them. This statute is almost verbatim a copy of the Missouri damage statute. In that state it has received a decisive construction after a somewhat lengthy period of uncertainty. In *Schultz v. Railroad Co.*, 36 Mo. 13, it was held that the general meaning of the words "any person" was the meaning which the legislature intended to attach to them, and that therefore, the common law rule of fellow servants taking the risk of each other's negligence, when not notorious and known to the employer, was abrogated. But this was not satisfactory, and in the case of *Connor v. C., R. I. & P. Railroad*, 59 Mo. 308, two of the five

judges vigorously dissented; Judge HOUGH in his dissent satisfactorily showing, to the writer's mind, that, whatever may be the sounder and more humane rule, the legislature never intended to change the rule as to the liability for negligence of a fellow servant by that statute, but only to give a cause of action to the representatives of a deceased person where none existed before, and to limit the extent of that liability. Finally, in the case of *Proctor v. H. & St. Joe. Railroad Co.*, 64 Mo. 112, the supreme court of that state took the view of the case so ably expounded by Judge HOUGH, and it has remained the law of that state ever since. Upon a similar statute the same words have received the same construction in Iowa (*Sullivan v. Miss. & Mo. Railway Co.*, 11 Iowa, 422); in Maine, (*Carle v. B. & Pac. Railway Co.*, 43 Me. 271); and in Colorado (*A., T. & S. F. Railway Co. v. Farrow*, 6 Colo. 498). The statute of this territory (sections 2308-2310) was adopted after the final decision in the Connor case in Missouri, and it was urged that it is the law that, when one jurisdiction adopts without change the statute of another jurisdiction, it also adopts the judicial construction placed upon it by that jurisdiction. While this is so, yet we do not think it necessary in this case to rest our decision upon that principle but rather upon the broader principle that there is nothing in the statute itself, nor in the history of its adoption, which goes to show that it was the intention of our legislature to overthrow a rule thoroughly ingrained in the judicial holdings of the courts of the land, and in view of which it must now be held that all contracts for hire to corporations, in the absence of express stipulations, are made. The action of the trial court in sustaining the demurrer to the first count was correct.

2. The second count was predicated upon the assumed fact that the defendant company was negli-

gent in its selection of the fellow servants of the deceased Sykes, or in the keeping of them in its employ after knowledge of their incompetency had been brought home to it, and that it was through such incompetency that the deceased was killed. After

INJURY to railroad employee: instruction to find for defendant. the plaintiffs' evidence was all in, the jury was instructed by the court to find for the defendant, which it did. Of this action

the plaintiffs complain. They insist that there was something to go to the jury, and that in instructing it to find for the defendant the court usurped the province of the jury, which was error. However, it is now the settled law of the supreme court of the United States, and of this court, that when evidence is of such a character that, should the jury find for one side rather than the other, it would be the duty of the court to set aside such verdict, it will, in the first instance direct a verdict for the party thus entitled to it. *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478; *Candelaria v. A., T. & S. F. Railroad Co.*, 27 Pac. Rep. (N. M.) 497; *Gildersleeve v. Atkinson*, Id. 477. We have thoroughly read the evidence produced by the plaintiffs to sustain the allegations of their second count, but we are unable to see where there is anything which tends to support those allegations. The action of the court, therefore, was correct.

3. The real difficulty in this case grows out of the sustaining the demurrer to the third count. It will be necessary, therefore, in order that a complete understanding of the count may be had, to set out in extenso the material portions of the count. After the allegations of corporation, the place of doing business

INJURY to railroad employee: negligence of fellow servants: proximate cause. on the part of the defendant, its employment of the deceased, and its duty to furnish proper, safe, and reliable cars, cabooses, and other machinery, the count continues as follows: "Yet, not regarding its duty and prom-

ises, in the premises, the said defendant did not so furnish the said Sykes with all safe, properly constructed, and reliable cars, locomotives, machinery, and tools for the proper conduct of his conducting of trains as aforesaid, in this: That after his engagement and entering the employment as aforesaid, and some short time previous to the happening of the event hereinafter mentioned, the said defendant failed to furnish said Sykes with a proper caboose or way car, such as is usually and ordinarily used upon said same railroad, and upon all other like railroads, but instead wrongfully, negligently, and carelessly gave and furnished him, for use upon his said trains, against his consent and over his protest (but which he was induced to take and use, under faithful promises of the defendant, by its agents and their servants, then and there to him made, that he would be furnished with a proper caboose in a very short time), a weakly built, common, unsubstantial box car, without any platforms, bottom beams, springs, bracing, or proper trucks, and without any doors in the ends, or windows in the ends, or cupola or lookout station in the top, through either of which approaching danger might be seen and prevented, as is usually upon cabooses and way cars upon other parts of said line and other like roads. And said box car, used as a caboose or way car as aforesaid, was so flimsily and improperly constructed it would, and did, during its use by said Sykes, aforesaid, easily become derailed and jump the track aforesaid, all of which was then and there known to said defendant; but the said George W. Sykes, so relying upon the promises of the defendant so made to him as aforesaid, that it would in a very short time furnish him with a good, safe, and proper caboose, did, relying upon said promise, continue in said employment until the thirtieth day of March, A. D. 1888, at which said date, at, to wit, the county of Bernalillo,

in the territory of New Mexico, said George W. Sykes was, pursuant to the order of the defendant, proceeding with one of its trains with the aforementioned box car, being used as a way car, with all due and proper care and diligence, eastward in said county, toward said Albuquerque, and when he had so proceeded to a point on said railroad, about four miles east of the small station of San Jose, and while still, as aforesaid, exercising all due and proper care and diligence in the premises, the defendant then and there being possessed, as aforesaid, of a certain other locomotive engine and train of cars attached thereto, which said latter locomotive engine and train of cars were then and there under the care and management of divers, then servants of the defendant, who were then and there driving the same upon and along said railroad, near and toward the point aforesaid, also in an easterly direction, and the said defendant then and there, by its servants last aforesaid, so carelessly, improperly, negligently, and unskillfully drove and managed the said locomotive engine and train of cars that, by and through the carelessness, negligence, unskillfulness, and improper conduct of the defendant, by its said servants in that behalf, and also by and through the negligence, carelessness, default, and improper conduct and wrongful act of the defendant in defaulting, refusing, and neglecting to furnish a proper caboose and way car to Sykes, as was its duty to do, the said locomotive engine then and there ran and struck, with comparative force and violence, upon and against the rear of the train and box car, being used as a caboose as aforesaid, and being conducted with all due and proper care and diligence by the said George W. Sykes, and by reason of the poor and improper construction of the same, broke the same into splinters, and said George W. Sykes was then and there, with great force and violence, struck by said locomotive, and by

splinters of said box car being used as aforesaid, and thrown with great violence from out of said car," from the effects of which he afterward died.

To this count the defendant demurred, and assigned several reasons therefor, among them that the said Sykes voluntarily used the said caboose; that it does not appear that there were any latent or hidden defects in or about the way car; that the negligence, if any, was the negligence of Sykes' fellow servants; and that the count is in many other respects uncertain, informal, and insufficient. The court sustained the demurrer. While this demurrer specifically sets out the grounds of objection, yet it is in substance a general demurrer, and under it any objections to the substance of the count may be urged whether assigned or not. 1 Chit. Pl. 663; Gould, Pl., p. 435, sec. 19. It is elementary that upon demurrer all facts which are well pleaded are admitted to be true. Therefore it must be considered that the facts in this count as plead, which are well plead, are before us with the same effect as though found by a jury.

At the argument counsel for both parties rested their contention solely upon the alleged negligence of the company in failing to provide the deceased, Sykes, with a safe and proper caboose, within a reasonable time after having promised him to do so. The position of the plaintiffs was that, as the defendant knew of the unsafe condition of the way car or caboose, and had promised to provide another in its stead, it assumed all risks from dangers to the deceased during a "reasonable time" which he might use it while waiting for the new car; and that such use was not, upon the part of the deceased, contributory negligence. The defendant contends, upon the other hand, that it is shown that the defects, if any, in the caboose, were patent and evident as immediately dangerous, and, therefore, that the rule contended for by the plaintiffs did not apply, but that

the use of such car, under the circumstances alleged in the count, notwithstanding the promise of the defendant, was contributory negligence on the part of the deceased, and that his representatives can not recover. "If the servant complain of the defect to the master, and the latter promises to remedy or repair it, the servant, by remaining on this assurance for a reasonable time in the service, will not be considered to have waived it, and the question of a reasonable time will be for the jury." 1 Lawson, Rights, Rem. & Pr., sec. 312, and cases cited; Gulf, Colorado & Santa Fe Railway Co. v. Brentford, 23 Am. St. Rep. 317, and annotated note; Hough v. Railway Co., 100 U. S. 213. In this last case the court holds that it is not contributory negligence, as a matter of law, to remain in a dangerous employment for a reasonable time after a promise by the employer to remedy the defect complained of, but that it was a question for the jury to say whether it was contributory negligence to so remain. This is unquestionably the general rule of law where an employee gives notice to his employer of defects in the machinery that he is using, and the employer promises to remedy the defects in a short time, unless such defects are so evidently dangerous as that it would be reckless and foolish for the employee to use the defective machinery, even under a promise that it should be immediately remedied. The defendant contends in this case that the allegations of this count, admitted by it to be true, show: First, that the deceased used the defective car for a longer period than by any possibility could be considered a reasonable time; and, second, that the defects set out in the count are so evidently dangerous that only a reckless person, one utterly careless of his safety, would have used the caboose without its being, at least, remedied. That, therefore, as a matter of law, he did contribute to his death, and that the action can not be sustained. In the case of District of Columbia

v. McElligott, 117 U. S. 621, the court carefully limit the ruling in the Hough case, *supra*. That was a case wherein McElligott was working in a gravel pit for the defendant. There was an overhanging bank, under which he with others was working, which threatened to break off and fall upon them. It was alleged that the supervisor of the work was notified of this danger, and promised to have it remedied immediately. Under that promise the plaintiff continued to work for but a short time, and while so working was injured. The court, in discussing the question of his contributory negligence, said: "If liability might come upon the district for the negligence of its officers controlling his services, he was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care, if he exposed himself to dangers that were so threatening or obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged, be guilty of such contributory negligence as would defeat his claim for injuries so received." Page 633.

If, then, the dangers were as great by reason of the alleged imperfections of the way car as are admitted by this demurrer, it would seem as though the case last cited went very far toward sustaining the defendant's contention that the deceased, Sykes, contributed by his own negligence to his death; and, if so, then clearly, under the law, his representatives can not recover in this action. But whether they can or not, under this view of the law, yet we think that the action of the trial judge was correct upon another view of this count. The real question presented by this count, and the demurrer thereto, is, what was the proximate cause of the injury to the deceased? Was it the negligence of the fellow servants upon the second train, or was it the

negligence of the company in failing, within a reasonable time, to provide the deceased with a suitable and proper way car, or was it the combined result of both negligences? If it was the first negligence, then clearly the action can not be sustained, for in the first part of this decision we have seen that the law is that no recovery can be had for the negligence of a fellow servant. If the proximate cause was the resultant of the two negligences, and one of those negligences is not actionable, then there is no cause of action upon which the suit can be predicated, for the proof must correspond with the allegation, and there would be no proof of the negligence of the fellow servant allowed. It is admitted by the demurrer that the facts are as alleged, if properly pleaded. But, if the plaintiffs can not recover for the negligence of a fellow servant, then that negligence, as an alleged cause of action, may not be so pleaded, and the demurrer in this case does not admit it as an actionable fact. Therefore, the count is not good, upon the theory that the injury was the result of the joint negligences of the fellow servants of Sykes, and the failure upon the part of the company to furnish a safe caboose. It would seem that the fair interpretation of this count was that it does charge the injury to be the result of the joint negligence of the fellow servants and the company, and hence that it was not a legal statement of a wrong upon which a suit might be predicated. But, conceding that the negligent action of the fellow servants upon the second train is alleged by the plaintiffs simply as a mere condition of the injury; and that they insist that the proximate cause of such injury was the negligence of the company in failing to furnish a proper and suitable way car within a reasonable time as it had promised to do, we have to inquire, was such negligence the proximate cause of the death of Sykes? What is a "proximate cause?" Definitions have been given by text-writers and in adjudicated cases which

will aid us materially in answering this question, though, as a matter of fact, each case will have to, in a great measure, depend upon its own particular facts in arriving at what is the proximate cause of an alleged injury. "A 'proximate cause' may be defined as that cause which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred." 16 Am. & Eng. Encyclopedia of Law, 416. This is the general rule "where no intervening efficient cause is found between the original wrongful act and the injurious consequence complained of." Another definition found in the same authority, and more particularly applicable here, is, "in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances." This rule is sustained by the highest authority. *Milwaukee Railway Co. v. Kellogg*, 94 U. S. 469, 475; *Hoag v. Lake Shore Railroad Co.*, 85 Pa. St. 293; 2 *Thomp. Neg.* 1085, sec. 2; 16 Am. & Eng. Encyclopedia of Law, 436, and cases cited under note 4.

It must be remembered in this case that the negligence complained of is the failure upon the part of the company to furnish a proper caboose, which from its construction would not jump the track; that should be strongly built; that should have platforms, bottom beams, springs, bracings, proper trucks, doors, end windows, and cupola. Now, under these definitions, and the law as laid down in the cited cases, the question is, could this defendant have foreseen, by any ordinary or any extraordinary foresight, that, because of its negligence to furnish such a caboose, another train upon its tracks would negligently run into this

caboose, rather than into one properly built and fitted up? If the second train is eliminated from the consideration of the case, was the negligence of the company to furnish a proper caboose in any manner whatever the cause of the death of Sykes? How, then, can that negligence be said to be the proximate cause of the injury? Supposing that the deceased had been furnished with a proper way car, and that a second train had run into it with comparative force and violence, is there any presumption from the fact that it was a proper way car that an accident would not have happened? Would not the way car have been thrown from the track, and the deceased with it, and would not the result of the force and violence of the collision and of the splinters from the way car, been, in all probability, the same as in this case? If it would, then the proximate cause of the injury was not the negligence in failing to furnish the proper way car, but the collision with the second train. In other words, if you take away this bad caboose, and place a good one in its stead, leaving all the other facts as alleged in the count, you will have the accident and the injury; but, if you take away the negligence of the fellow servants in the second train—it makes no difference whether there is an imperfect caboose or not—there will be no accident, and the negligence in not furnishing a proper caboose would not be the natural or probable cause of the injury, and, under the ruling of the courts, would not be the proximate cause of Sykes' death.

If because of the weakness or lack of support, or of platform, or of bottom beams, the car had broken down, or jumped the track, and the injury had been caused, a far different case would have been presented; or if because of the lack of windows, and without any other alleged negligence, the way car had been run down, and the deceased injured, because he could not see the approaching danger, which he was looking for,

the case would be different; but there is no allegation in this count which can be construed into meaning that Sykes came to his death by reason of the absence of the windows. We are not to be understood as holding that, if there had been proper allegations of the defects in the way car being the primary cause of injury to the deceased—the fact that the force which caused those defects to operate disastrously was brought into action by the negligence of the fellow servants of the deceased in the second train—there would have been no cause of action. If the allegation had been, for instance, that, by reason of the negligence of the defendant in failing to furnish a way car with windows in the end, and with a cupola, the deceased was unable to see approaching danger, for which he was on the lookout, and, therefore, he was injured, he probably would have alleged a good cause of action. It is true that the plaintiffs alleged generally in this count that the way car had no doors or windows in the ends by “which approaching danger might be seen and prevented,” but that is all. The allegation as to his injuries is that, “by reason of the poor and improper construction of the same (referring to the way car), broke the same into splinters,” and that Sykes was then and there struck by said locomotive, and by the splinters of said box car. This was the cause of his death, and we are unable to see how the failure to furnish a way car with proper end doors and windows, upon these allegations, can by any construction be considered the proximate cause of the death. The following cases fully sustain, in our judgment, the above holding: *Pease, Adm’x, v. Chicago & N. W. Railway Co.*, 20 N. W. Rep. (Wis.) 908; *Fowler v. Chicago & N. W. Railway Co.*, 21 N. W. Rep. (Wis.) 40; *Hayes v. Western Railway Co.*, 3 Cush. 271; *Whittaker v. Delaware Co.*, 3 N. Y. (Sup.) 576; *Memphis Railroad Co. v. Thomas*, 51 Miss. 637; *Gilman v. Eastern Railroad Co.*, 10 Allen, 233; *King v. Boston*, etc.,

Railroad Co., 9 Cush. (Mass.) 112; *Handelun v. B., C. R. & L. Railway Co.*, 72 Iowa, 709, 32 N. W. Rep. 4; *Campbell v. City of Stillwater*, 20 N. W. Rep. (Minn.) 320; *Hoag v. Railroad Co.*, 85 Pa. St. 293; *Township v. Watson*, 9 Atl. Rep. (Pa.) 433. As, then, the decedent, under the facts as plead in this count, met his death by reason of the negligence of the fellow servants on the second train, which was, in our view of the case, the proximate cause, we find no error in the rulings of the court below, and they are, therefore, affirmed.

McFIE, J.—I agree with the conclusions of the court, that the court below did not err in sustaining the demurrer to the first count of plaintiffs' declaration, and that the court below properly instructed the jury to find for the defendant on the trial had, upon issue joined under the second count of plaintiffs' declaration, as the proof clearly failed to sustain the allegations of the declaration. I agree with the conclusions of Mr. Justice SEEDS that the court below properly sustained the demurrer of the defendant to the third count of plaintiff's declaration. The first count declared upon the negligence of fellow servants of the deceased; the second count charged the negligence of the defendant in the selection and retention of incompetent fellow servants, after full knowledge of their incompetency, and that decedent was killed by reason of such incompetency; and the third count, that the decedent was killed by reason of the combined negligence of the defendant and fellow servants. I do not question the right of recovery, in a proper case, for the combined negligence of master and fellow servant, where the negligence of each contributed to the injury, but the third count of plaintiffs' declaration is subject to the demurrer because it fails to point out with certainty wherein the negligence complained of on the part of the defendant contributed to the injury. It is not

sufficient to allege negligence on the part of the defendant. It must also be shown that the injury complained of resulted from the specific negligence complained of. It will not do, in actions of this nature, to leave it a matter of conjecture as to whether the injury resulted from the negligence complained of or not. The declaration must state a cause of action, and if it fails to do so, either by insufficient allegations, or by alleging matter that destroys the right of action, it must yield to a demurrer. The negligence of the defendant is alleged to be that it furnished deceased with an improper, unsafe, and defective caboose, knowing that it was unsafe and defective; and, although defendant promised to do so, it failed to furnish the deceased with a proper caboose or way car, such as is usually and ordinarily used upon said same railroad, and upon all other like railroads, but instead wrongfully, negligently, and carelessly furnished him with a weakly built, common, unsubstantial box car, without any platforms, beams, springs, bracing, and proper trucks, and without doors and windows in the ends or cupola, or lookout station on the top. These concluding allegations are simply descriptive of a box car caboose, as distinguished from the usual caboose or way car used by that and other roads; not that the box car was particularly defective, by being broken and unfit for use, but because it was a box car, whereas the company had promised to give plaintiff a regular caboose, and had failed and neglected to do so. But, suppose the defendant was negligent in this respect, we fail to see how such negligence caused or contributed to the injury complained of, much less became the proximate or promotive cause, as defined by law. "That, in determining what is proximity of cause, the true rule is that the injury must be the natural and probable consequence of the negligence, such a consequence as, under the surrounding circumstances of the case, might and

ought to have been foreseen by the wrongdoer as likely to flow from his act." Township of West Mahanoy v. Watson (Sup. Ct. Pa., May 8, 1887), 9 Atl. Rep. 433. In the case of Hoag v. Lake Shore, etc., Railroad Co., 85 Pa. St. 293, Mr. Justice TRUNKEY, then presiding judge of the common pleas of Venango county, in his charge to the jury on the trial of the above named case, said: "The immediate, and not the remote cause, is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, did the cause alleged produce its effects without another intervening cause; or was it to operate through or by means of this intervening cause." "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." And in same opinion says: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case, the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be

considered as reaching to the effect and proximate to it. The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury." *Milwaukee & St. Paul Railroad Co. v. Kellogg*, 94 U. S. 469. To the same effect, in Massachusetts, it is held "that the proximate cause is the object of inquiry, and when discovered is to be regarded and relied upon. We can not reason as to chances or probabilities. They are held to be too remote to form the basis of judicial decision." *Hayes v. Western Railroad Co.*, 3 Cush. 271.

A case involving the same questions as the one under consideration is found in 61 Wis. 159 (*Fowler v. Chicago & N. W. Railroad Co.*). In it a switchman was injured, while making a coupling, by an engine being backed down upon him. The engine was not a regular switch engine, but it was a regular road engine, being used for switching purposes, and had been so used for sixteen days. The regular switch engine would not have had the goose-neck projection by which he was injured, and would have been so constructed as not to obstruct the view backward. It was held that the negligence of coservants, and not any insufficiency or unfitness in the engine itself, was the proximate cause of the injury, and that the company was not liable. About the same time that court held, where the chain coupling was broken, and the brakeman had to go under the platform to make the coupling, and while he was under it the conductor, not knowing his position, gave the signal to the engineer to move up, and thereby the brakeman was killed, that it was the negligence of the conductor, and not the imperfect coupling, that was the proximate cause of the injury, and, therefore, the company was not liable. *Pease v. Chicago & Northwestern Railroad Co.*, 61 Wis. 163, 20 N. W. Rep. 908. In *Henry v. St. Louis, etc., Railroad Co.*, 76 Mo. 288; See 12

Am. & Eng. R. R. Cases, 1361, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and while upon the ground stepped upon a track, where he was run upon and injured by a train. HOUGH, J., speaking for the court, said: "It is, perhaps, probable that, if the plaintiff had not been ordered out of the caboose, he would not have been injured, but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home, he certainly would not have been injured as he was, but his leaving home could not, therefore, be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural, nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation in the absence of any regulation of the defendant to justify it, can not be considered in this action, and the legal aspect of the case is precisely the same that it would have been if no such expulsion had taken place." Where several concurring acts or conditions of things, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded the proximate cause of the injury, if the injury be one which might reasonably be anticipated from the act or omission, and which would not have occurred without it. *Campbell v. City of Stillwater* (filed July 18, 1884), 20 N. W. Rep. 320.

From these decisions, the proximate cause of the injury in this case was not the negligence of the defendant in failing to furnish the usual way car or caboose, because the car used by the deceased, although a box car, was making its run regularly, and, so far as the declaration shows, was rendering as safe and complete service as if another car had been furnished, until it was dashed into by another train. What injury

would have been done the deceased, if the second train had not run into the first? Clearly, none whatever. It is pure speculation to say that any injury would have resulted, and the law abhors speculation. The plaintiff alleges that this box car was liable to jump the track, as it had done before; but a complete answer to that is that it did not do so, but, on the contrary, was making its regular run. If the declaration had alleged that the car had jumped the track, and by reason thereof the deceased was killed, a cause of action not demurrable would be stated, because it would be apparent that the injury resulted from the negligence of the company in furnishing a car that was liable to run off the track, and in failing to furnish one that was not. The negligence would appear to be the immediate and proximate cause of the injury, there being no intervening, independent cause between the negligence and the injury.

The third count of this declaration, however, presents a very different case. Here we have the intervention of an independent cause, which actually caused the death of the deceased—a rear-end collision by another locomotive and train, managed by coservants of the deceased. The averment is as follows: “The said locomotive engine then and there ran and struck, with comparative force and violence, upon and against the rear of the train and box car, being used as a caboose aforesaid, and being conducted with all due and proper care and diligence by the said George W. Sykes, and, by reason of the poor and improper construction of the same, broke the same into splinters, and the said George W. Sykes was then and there, with great force and violence, struck by said locomotive, and by splinters of said box car being used as aforesaid.” In view of this averment that the car was broken to splinters by the force of the collision, it seems idle to contend that, if the defendant company

had furnished the deceased the kind of a car he desired he would not have been killed. The collision, and the injury resulting in the death of the deceased, were almost simultaneous occurrences. There can be no reasonable doubt as to the cause of the death of Sykes. He was killed by the second train dashing into the first, and this was the proximate cause of the injury. Having discovered the proximate cause, the inquiry stops there, because to go back of it would be both endless and useless. *Lewis v. Railroad Co.*, Am. & Eng. R. R. Cases, vol. 18, p. 271.

It is true the plaintiff avers, in general terms, that the defendant's failure to furnish another car was also the cause of the injury; but, in my opinion, she wholly fails to point out in what way it caused or contributed to the injury. The averment seems to me to be destitute of foundation, and in the nature of a predicate for the introduction of uncertain and improper evidence. In the case of *Toledo, Wabash & Western Railway Company v. Jones*, 76 Ill. 311, where the plaintiff alleged negligence in keeping a crossing in repair, where he received an injury by a collision of a train with plaintiff's wagon, there was no averment that the condition of the crossing contributed to the injury, but the gravamen of the action was the failure to give the statutory signal, and failure to slack the speed, held, that evidence could not be given to show the condition of the crossing, * * * nor can its condition be shown as a makeweight to sustain an entirely different charge, in which the condition of the crossing is not an element. In this case the wrong complained of against the company is that they failed to furnish a certain kind of car for the use of said employee, but it is not averred that their failure in this respect was the cause of the locomotive running into the car. But it is charged that the collision was caused by the wrong, negligence, and incompetency of the defendant, by and through its

servants. An employer is not liable for the negligent acts of coservants to each other. *Tuttle v. Milwaukee Railway*, 122 U. S. 189.

Therefore, so far as it attempts to charge the defendant with the negligent acts of coservants, the count is bad. It is an immaterial inquiry which of these fellow servants were at fault, but it is very clear that both of these trains did not have a right to the same part of the track at the same time. One or the other was in the wrong, and, to create a liability against the defendant, the declaration must aver the particular act or omission of the defendant that caused the collision, and this it does not attempt to do. An omission that was not the proximate cause would not be sufficient. In this respect the count does not state a cause of action against the defendant, for it avers the proximate cause of the injury to have been the intervention of an independent locomotive, which ran into the car, as in *Township v. Watson*, above cited. Eliminate this second train from consideration, and there is nothing left upon which to found an action for damages against the defendant. There is no averment in this count that the company knowingly selected incompetent servants. That was the subject of the second count, upon which the plaintiff secured a trial, and therefore such can not be considered as an element of damages under this count. The demurrer being interposed, the facts well pleaded were admitted. The demurrer challenges the sufficiency of the facts stated to constitute a cause of action in law. The trial is by the court, as the matter in issue is one of law, and not of fact. The court below found, upon the facts stated, that the negligence of coservants of the deceased was the proximate cause of the injury complained of, and not the combined negligence of defendant and coservants, as alleged in the count, and hence sustained the demurrer. The plaintiff stood on his demurrer, refused

to amend, and judgment was properly given for the defendant.

FREEMAN, J. (dissenting).—I am unable to agree with the majority of the court in the conclusions reached in this case. I agree that the doctrine of the nonliability of the master to the servant for the negligence of a fellow servant seems to be now well settled. I shall not undertake to review the numerous authorities, nor to discuss the many hotly contested cases through which this questionable doctrine has passed. It has come up "through great tribulation," and is possibly entitled to a rest. But the decision of a majority of the court in this case proceeds a step further, and that, too, in the wrong direction, to exempt the master, not only from the consequences of his servant's negligence, but from that of his own, if it appear that a coservant contributed to the result. This proposition is, to my mind, too dangerous in its tendency, and too far reaching in its consequences, to be allowed to pass without dissent. That the grounds of my dissent may not be misunderstood, I will state what I understand to be the precise issue. The plaintiff alleges, in substance, that the injury for which redress is sought was the combined result of the conduct of the injured party's fellow servant and the use of defective machinery (a way car) in the hands of the injured employee, which he was induced to use by the promises of the employer to repair. To this count a demurrer was interposed and sustained. The opinion of a majority of this court affirms the action of the court below.

I shall endeavor to sustain the proposition that, while the master is not liable to one servant for the wrongful act of a fellow servant, he is nevertheless liable for his own wrong; and that he can not escape that liability by showing that the negligence or wrong of the injured party's fellow servant contributed to the

result; and that while an employee assumes the ordinary risks incident to his employment, among others, breakage of machinery, and injury from defects in machinery, yet if the servant discover defects in such machinery, and point them out, and the master promise to repair within a reasonable time, and the servant is induced thereby to continue in the use of such defective machinery, the danger to such use not being so imminent or impending as to deter a man of ordinary prudence, and while thus employed he is injured by such machinery, he has a right of action against the master. 6 Hurl. & N. 937; 76 Pa. St. 389; 20 Minn. 9; 62 Mo. 35; 100 U. S. 218.

Before, however, inviting attention to the discussion of the main question involved, I desire to suggest, with great respect, that it seems to me the reasoning employed by the majority to sustain the demurrer is at fault, in that the conclusion is reached from two absolutely contradictory premises. It is held that the count is defective, in that it shows that the dangerous character of the machine (way car) was so apparent that it was contributory negligence to use the car. This for the purpose of bringing the case within the rule laid down by the supreme court of the United States in the case of *District of Columbia v. McElligott*, 117 U. S. 621. This position, however, is not only abandoned, but entirely overturned, in the effort to establish the contrary proposition, that the defective machinery, so far from being so palpably dangerous as to prevent its use by an ordinarily prudent man, was not in fact at all dangerous, and did not in fact even contribute to, much less cause, the accident. The rule as to the effect to be given to the negligence of a fellow servant, when combined with the negligence of the master, is thus stated in note 10, page 981, *Thompson on Negligence*: "It is but another expression of rules already announced, to say that, if the negligence of the master combines

with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master." The learned author cites, in support of this proposition, 76 N. C. 320, wherein the doctrine is laid down in this language by READE, J.: "The decisions, both English and American, go very far toward the conclusion that one servant can not recover of the employer for any injury which results from the negligence of a fellow servant, in a business common to both. There may be exceptions, but, grant that to be so for the sake of argument, yet it is not so where the employer contributes to the negligence of a fellow servant, or to the injury; as if he employ an unfit servant, or, as in the case of a bad engine, knows that it is bad, and fails to repair it. So in this case, if the defendant answers that plaintiff can not recover because the injury resulted from the negligence of his fellow servant, the engineer, the plaintiff may reply that the defendant contributed to the negligence of the engineer, and to the injury, by having a bad engine."

The same doctrine was laid down in the case of Gould v. Boston & Albany Railroad Company, 73 N. Y. 38. The facts in that case were substantially as follows: The plaintiff was engineer in the defendant's employ, and, as such, went with a freight train from Greenbush on the morning of February 3. This train was preceded by one under an engineer named Hughes, with seventeen cars, two brakemen, and a conductor. Plaintiff's evidence tended to show that three brakemen were necessary to such a train, and were usually sent. One or two other trains had preceded it the same morning. There was a head conductor, Rockefeller, who gave the conductors directions as to what cars were to go in the different trains. He also assigned the brakemen to go with the several trains. After receiving instructions, trains were started by, and were each

under the control of, each conductor. Three brakemen had been assigned by Rockefeller, and were ready to go with Hughes' train of seventeen cars on the morning in question, but one overslept himself, and failed to go, and the conductor of the train started without him, and without giving any notice to the head conductor, Rockefeller, of the absence of the third brakeman. Hughes' train, upon arriving at Chatham, was stopped to take coal upon the engine, as was customary. A train ahead of it still stood at the coal pile taking coal, and Hughes' train stopped and stood behind it for some ten minutes. The conductor and one brakeman got off and went forward to be ready to put on coal. When the forward train had gone, Hughes started his train up to get to the coal pile. The train broke in two and eleven cars ran back. Upon them was the other brakeman, named Losty, who tried in vain to stop them. They collided with plaintiff's train, and he was injured. In this case it was held that the company were liable. Say the court, ANDREWS, J., delivering the opinion: "The rule that the master is not liable for the negligence of a coservant does not, however, go to the extent of exempting him from liability in every case when it appears that he did not himself do or direct the doing of the negligent act, or even when the immediate negligence is that of a person who in some sense was the coservant of the person injured. There are certain duties which concern the safety of the servant, which belong to the master to perform, and he can not rid himself of responsibility to his servant for not performing them, by showing that he delegated the performance to another servant, who neglected to follow his instructions, or omitted to do the duty intrusted to him. The duty of the master to select competent servants, and to provide safe implements and machinery for the use of his servants, belongs to this class. The rule that the servant takes the risks of

the service 'supposes,' says Lord CRANWORTH, 'that the master has secured proper servants and proper machinery for the conduct of the work.' " Citing *Barton Shill Coal Co. v. Reid*, 3 Macq. 275. It is there held that the duty to provide competent servants and proper machinery is a duty at all times resting upon the company, which it was bound to discharge for the protection of all persons, its servants as well as others, and which, if neglected and injury to a servant resulted from the neglect, gave a right of action, notwithstanding the fact that the immediate negligence was that of coservants intrusted with such performance. The rule is thus stated in the case of *Paulmier, Administrator of Cohart, v. The Erie Railroad Company*, 31 N. J. Law, 155: "The rule already referred to is that the master is not responsible to one servant for the ill consequences of the negligence of a fellow servant in the course of common employment. The reason for this rule is that, as the master can not prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable. But the servant does not agree to take the chance of any negligence on the part of his employer; and no case has gone so far as to hold that, where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servants. Contributory negligence, to defeat a right of action, must be that of the party injured."

In the case of *Cayzer v. Taylor*, 10 Gray (Mass.), the cause of action was stated substantially as follows: The defendant negligently managed his engine, and did not provide a competent and suitable engineer and boiler and engine and pump and gauge and appendages and machinery and precautions for safety used

therewith, but knowingly and carelessly provided such as were not competent and suitable, and sufficiently safe, and knowingly and carelessly continued the same in use, and improperly used them while out of order and unsafe, either solely or in connection with his servants. There was a verdict for the plaintiff, and, on appeal to the supreme court, it was said by THOMAS, J., delivering the opinion: "It is now well settled law that one entering into the service of another takes upon himself the ordinary risks of the employment in which he is engaged, including the negligent acts of his fellow workmen in such employment [citing *Farwell v. Boston & Worcester Railroad Co.*, 4 Metc. 49; *King v. Boston & Worcester Railroad Co.*, 9 Cush. 112; *Gillshannon v. Stony Brook Railroad Co.*, 10 Cush. 228]. It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant, or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be responsible for the injuries resulting from an act of carelessness or negligence of such an engineer; but we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest, or the positive rules of law require, he is not to be liable for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented injury. The very object and purpose of a safeguard, like the fusible plug, or protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance, to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened, had a safeguard re-

quired by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it. * * * The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and, among others, the negligence of his fellow servants, for the protection of the master. The principle should not be so extended as to impair in the least degree the obligation resting upon the master in the prosecution of a business, involving unusual risks of health, or life or limb, to employ well guarded instruments, with competent engines." Continuing the quotation from the note already cited from *Thompson on Negligence*, it is said: "This [the liability of the master for injuries to servants] happens where the negligence of the master in furnishing defective machinery or appliances, or an insufficient force of colaborers, combines with the negligence of the servants whose duty it is to oversee and use the particular machinery, whereby another servant is injured; or where the negligence of the master in selecting an incompetent servant combines with the negligence of such servant, or when the negligence of a railroad company in not furnishing a sufficient number of workmen for the management of a train, combines with the negligence of a particular servant in starting a train while insufficiently manned. * * * Perhaps a better expression of the rule is that given in the headnote of *Cayzer v. Taylor*, 10 Gray, 274, 'that the master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow servant contributes to the accident.'" The doctrine is thus stated by Mr. Wood, at page 685 of his work on *Master and Servant*: "The servant, although he may know that the instrumentalities of the business

are not in good repair or condition, is not therefore necessarily chargeable with negligence in remaining in the master's employ, and using them, unless real danger therefrom is apparent. In all cases where there is any doubt, the question is for the jury." "The master," says the same author, at page 687, "is bound to exercise reasonable care to prevent accidents to his workmen. He is bound to furnish suitable machinery, and see that it is properly protected and kept in proper repair." The case of *Snow v. Housatonic Railroad Co.*, 8 Allen, 441, was an action against the railroad company to recover damages incurred by the plaintiff, who was injured while endeavoring to uncouple the train. The proof showed that the accident was the result of a defect in the road, of which defect the plaintiff had knowledge. BIGELOW, J., in a very able opinion, wherein he reviewed the questions relating to the relations existing between master and servant, held that the continuance in the service of the company by the plaintiff after knowledge of the defect was not of itself evidence of such negligence as to defeat the action, and that in all such cases the question of negligence on the servant's part is a question for the jury. The rule that the master is liable for an accident growing out of the use of defective machinery by the servant is thus laid down in *Wood, Master and Servant*, section 378: "But if there is any evidence that tends to excuse the plaintiff from the imputation of negligence on his part, as that he had called the attention of the master to the defect, and he had promised to repair it, or if the danger was not obvious, or if he incurred the risk by the express direction and command of the master or his agent, and the danger was not inevitable or a necessary result of performing the service, then it is a question for the jury whether or not the performance of the service, or his acts at the time of the happening of the injury, were negligent in

fact. Where the servant, being aware of the danger of the service, complains to the master, and he promises to remedy the defect, the master is liable for injuries resulting to him therefrom, and he is not chargeable with contributory negligence by remaining in the service, unless the danger is so great that a man of ordinary prudence would not remain." In support of this proposition a long line of authorities is cited. Mr. Wharton, in his work on Negligence, supports the same proposition, and speaks of it as a doctrine peculiar to this country. This, however, is not altogether correct, the leading English case on the subject being that of *Clarke v. Holmes*, 7 Hurl. & N. 942. The same doctrine is supported by the following decisions: "*McGowan v. St. Louis & Iron Mountain Railroad Co.*, 61 Mo. 528; *Conroy v. Vulcan Iron Works*, 6 Mo. Ct. App. 102; *Greenleaf v. Ill. Central Railroad Co.*, 29 Iowa, 14; *Patterson v. P. & C. Railroad Co.*, 76 Pa. 389; *Laning v. N. Y. C. Railroad Co.*, 49 N. Y. 521.

The doctrine of the master's liability to the servant for accidents resulting from the use of defective machinery is thus laid down by Mr. Justice HARLAN in the case of *Hough v. Railroad Co.*, 100 U. S. 213: "If the servant of such a company, who has knowledge of the defects in the machinery, gives notice thereof to the proper officer, and is promised that they shall remedy it, his subsequent use of it, on the well grounded belief that it would be put in proper condition within a reasonable time, does not necessarily, or as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether, in relying upon such promise, and using the machinery after he knew its defective and insufficient condition, he was in the exercise of due care. The burden of proof in such case is upon the company to show contributory negligence." Nor can the master shield himself from

responsibility for injury growing out of the use of defective machinery by showing that the negligence of a fellow servant contributed to it. Where the injury is the result in part of the negligence of a fellow servant, and in part the negligence of the master, the latter is liable. In the case of *Tennessee Coal, Iron & W. Railroad Co. v. Kyle*, 8 So. Rep. (Ala.) 764, the accident resulted from a collision between an engine (running without a cowcatcher or pilot) and a cow, and the company was held to be liable. In the case of *Town v. Michigan Cent. Railroad Co.*, 84 Mich. 214, 665, the plaintiff, an engineer, was injured by running into an open switch. The switch had some months before been abandoned, and the lights taken down. Shortly previous to the accident, however, the switch had been reopened, but the lights had not been replaced. The company contended that the absence of the light was not the proximate cause of the accident; that if the switch had been locked the engine would have passed over safely; and that the opening or unlocking of the switch was caused either by the intermeddling of a stranger, or by the negligence of a fellow servant of the plaintiff, and that in either event he could not recover. But the court held that, if the lights would have prevented the accident by giving timely warning of the condition of the switch, their absence was just as much the proximate cause of the accident as the unlocking or turning of the switch, "and if they were concurrent causes the defendant would be liable." In *Cone v. Railroad Co.*, 81 N. Y. 206, the company was held liable for an accident resulting from the sudden starting of a locomotive, caused by its being out of repair. In that case, as in this, the doctrine of the negligence of a fellow servant (the engineer in charge) was invoked. If he had been careful, it was alleged, he might have prevented the accident. But the court held otherwise, saying: "If this doctrine is accepted,

it will loosen the rule of responsibility, which now bears none too closely upon corporate conduct." In *Elmer v. Locke*, 125 Mass. 575, the injury was the combined result of the defective construction of trestle-work and the negligence of a fellow servant. The defendant was held liable, the court holding that "it does not exonerate him from the consequences of a failure in the performance of his duty, if such failure contributed to the injury, to show that if others for whom he was not responsible had done their duty the accident would not have occurred;" citing 10 Gray, 274; 11 Allen, 560; 97 Mass. 361; 111 Mass. 136. To the same effect is the case of *Franklin v. Winona & St. Paul R'y Co.*, 37 Minn. 409. The same defense as in this case was attempted to be set up in the case of *Ellis v. N. Y., L. E. & W. R'y Co.*, 95 N. Y. 546, but the court said: "This rule [the fellow servant rule], however, has no application if the company has at the same time disregarded its obligation to provide a suitable roadbed or engine or cars." The following authorities also support the same proposition: 78 Mich. 513; 46 Wis. 497; 29 Kan. 149; 10 Gray, 281; 73 N. Y. 38; 5 Vroom (N. J.) 551; 1 McCrary, 516; 76 N. C. 320; 100 N. Y. 516. Indeed, the doctrine of the master's liability, where his negligence contributes to the accident, is settled by such an unbroken chain of authorities as to lead the learned author of the notes to English and American railroad cases to declare: "The cases approving this proposition are numerous, and the doctrine is supported with a unanimity not to be found among the authorities on any other branch of the law of fellow servants." 44 Am. & Eng. R. R. Cases, 623. This doctrine "has been so often asserted by the courts of the highest character as to be no longer an open question." 48 Am. & Eng. R. R. Cases, 335. It is a cruel and inhuman doctrine that the employer, though he is aware that his own neglect to

furnish the proper safeguards for the lives and limbs of those in his employment, puts them in constant hazard of injury, is not to be held accountable to those employees, who, serving under him, under such circumstances, are injured by his neglect and omissions." Id.

The fatal error, which, in my opinion, lurks in the doctrine propounded by the majority of the court, consists: First, in the application of the doctrine of fellow servants, in a qualified sense, at least, to the relation of master and servant; and, second, in the application of the doctrine of proximate and remote, mediate and immediate cause, to cases wherein the injury is the result in part of the negligence of the master and in part of that of the servant. I affirm without hesitation that, wherever the facts of the case demonstrate that the negligence of the master contributed to the accident, negligence is to be regarded, as a matter of law, as direct and proximate. This doctrine is laid down without qualification by the supreme court of the United States in the case of *Grand Trunk Railroad Co. v. Cummings*, 106 U. S. 702, where the court say: "In the instruction given we find no error. It was in effect that, if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong." The only possible escape from this unbroken line of authorities is to say that, notwithstanding the declaration of plaintiff in error that her late husband came to his death "also by and through the negligence, carelessness, default, and improper conduct and wrongful act of the defendant, in defaulting, refusing, and neglect-

ing to furnish a proper caboose and way car," yet this court will determine, as a matter of fact, that the alleged defect in the way car contributed nothing whatever to the accident; that, even if the deceased had been provided with a proper way car, the result would have been the same. I insist that this and like questions are matters for the jury. "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of all the circumstances and facts attending it." *Milwaukee & St. Paul R'y Co. v. Kellogg*, 94 U. S. 474.

[No. 464. August 18, 1892.]

**TERRITORY OF NEW MEXICO EX REL. CHARLES
H. GILDERSLEEVE, PLAINTIFF IN ERROR, V.
JOSE L. PEREA, SHERIFF, ETC., DEFENDANT IN
ERROR.**

TAX SALE—CERTIFICATE OF PURCHASE, ASSIGNMENT OF—SECTION 2885, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.—The writing of his name in blank by the purchaser on the back of a certificate of tax sale is not sufficient to constitute an "indorsement," within the meaning of section 2885, Compiled Laws, providing that such certificates "shall be assignable by indorsement." By the words "assignable by indorsement," is meant that the assignment itself as well as the name of the assignor shall be written upon the instrument; and a holder of such a certificate, signed on the back by the purchaser in blank, is not authorized to write an assignment above such signature.

ID.—RECORDING OF CERTIFICATE—TITLE.—The mere delivery to another of a certificate of tax sale by the original purchaser, with his name written in blank on the back, vests no right or title in the holder. Under section 2885, Compiled Laws, before the right and title of the original purchaser of such certificate can vest in an assignee or his legal representatives, the assignment must be entered upon the record of sales in the office of the probate clerk, and such entry must be made before any rights of innocent parties, acquired under such certificate, intervene.

ID.—CERTIFICATE OF PURCHASE—MANDAMUS BY HOLDER TO COMPEL SHERIFF TO EXECUTE DEED.—In a proceeding by mandamus, by a holder of a certificate of tax sale, indorsed in blank by the original purchaser, to compel the sheriff and ex officio collector of Bernalillo county to execute and deliver to him a deed to the land sold, where it appeared that the defendant, by the order of the board of county commissioners, had previously made and delivered to the administrator and legatee of the original purchaser a deed to the land, after the time of redemption had expired; that the proceedings before the board were regular; and that, at the time of the execution and delivery of the deed, there was no assignment of such certificate of record in the office of the probate clerk,—Held: The sheriff had no power to execute a second deed to the land, while the first deed remained uncanceled, and the court below properly refused to grant a peremptory writ of mandamus to compel him to do so.

ERROR, from a judgment in favor of defendant, to the Second Judicial District Court, Bernalillo county. Judgment affirmed.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & BRUNER for plaintiff in error.

Section 2885, Compiled Laws, 1884, expressly provides that "the certificate of sale shall be assignable by indorsement," and the court erred in holding that the indorsement in blank and delivery of the certificate to the relator, by Moore in his lifetime, was, under the admitted circumstances, ineffectual to transfer the same to relator. At common law a chose in action, such as a certificate of sale, was not assignable. *Mandeville v. Welch*, 5 Wheat. 283.

An "assignment" is the transfer to another of the whole of, or any estate or right in, any property, real or personal, in possession, or in action. 1 Bouv. Law Dict. 194.

"Indorsement" is the "writing one's name on the back" of the instrument assigned for the purpose of transferring the right of the holder to some other person. 1 Bouv. Law Dict. 790; 20 Vt. 499. '

The purpose of the statute is to make the certificate assignable by indorsement and delivery, and a blank indorsement and delivery vests in the holder the legal title upon filling up the formal assignment to himself and entering the same upon the record of sales as required by the statute. 13 S. & R. 315; 18 Pick. 63; 16 East, 12; Hyde v. Supervisors, 43 Wis. 136; Potts v. Cooley, 13 N. W. Rep. 682; Tutt v. Cousins, 50 Mo. 152; Noyes v. Brown, 33 Vt. 431; Runyan v. Mersersan, 11 Johns. 504.

The assignment by indorsement in blank imported authority to the assignee to fill in the full assignment above the signature, which might be done at any time. Evans v. Gee, 11 Pet. 80; Palmer v. Nassau Bank, 78 Ill. 380; Morris v. Preston, 93 Id. 215; Angle v. N. W. Ins. Co., 92 U. S. 330.

The assignment thus made, upon being entered in the record of sales, in pursuance of the statute, vested in the assignee all the right and title of the purchaser. Comp. Laws, sec. 2892.

The proceedings before the board of county commissioners were wholly ex parte, and the order to the sheriff to make the deed was *res inter alios acta* so far as the actual holder of the certificate was concerned, and he is not bound in any way by the proceedings. Comp. Laws, sec. 2892; Black. Tax Tit., pp. 371, 374, 442, et seq.; Bouldin v. Massie, 7 Wheat. 122.

The execution of the deed to Moore's representatives did not exhaust the power, nor relieve from the duty imposed upon the sheriff as collector by section 2892, and the third, fourth, and fifth conclusions of law were erroneous. Black. on Tax Tit. 371, 492; Corbin v. Bronson, 28 Kan. 534; Douglas v. Unzam, 16 Kan. 515; White v. Strabes, 17 Wis. 146; Clipping v. Fuller, 10 Kan. 377; Massy v. Clabaugh, 6 Ill. 26; Gould v. Thompson, 45 Iowa, 451; State v.

Winn, 19 Wis. 304; Grimm v. O'Connell, 54 Cal. 523; Black. Tax Tit. 376.

Any attempt to confer judicial powers upon the board is in contravention of the organic act, and void. Sec. 1907 Organic Act, Comp. Laws, p. 70.

No court, or other tribunal, can make an order, or render a judgment, binding upon a person who is not a party to it, and who has had no notice of, and does not appear in such proceedings. Wells on Jur., secs. 68-82; Thatcher v. Powell, 6 Wheat. 119.

Mandamus is the proper remedy. Sec. 1993, Comp. Laws.

F. W. CLANCY for defendant in error.

The writing, by W. S. Moore of his name on the back of the certificate of sale, was not such an assignment by indorsement as contemplated by the statute, and was ineffectual to transfer the same to the relator. Sec. 2885, Comp. Laws, 1884; 1 Bouv. Law Dict. 790; Anderson's Law Dict. 538; Rapalje & Lawrence Law Dict. 648, 649. See, also, Commonwealth v. Spilman, 124 Mass. 329; Powell v. Commonwealth, 11 Gratt. 830.

A certificate of tax sale is in no sense a negotiable instrument. Eaton v. Supervisors, 44 Wis. 492; Horn v. Garry, 49 Id. 469, 470; Black on Taxation, sec. 162; Watson v. Phelps, 40 Iowa, 483.

The writing of an assignment over the signature of the purchaser by the relator, after his death, was unauthorized, and the assignment so written was wholly inoperative and void. Miller v. McDonald, 72 Ga. 20; Lehigh v. Mohr, 83 Pa. St. 228; Clark v. Sigourney, 17 Conn. 523; Galt v. Galloway, 4 Pet. 344.

Under section 2885, Compiled Laws, no right or title can vest in an assignee of such a certificate until the assignment is "entered upon the record of tax sales in the office of the probate clerk. The wording

of the statute is plain and unambiguous, and there is no occasion to go outside of its language to determine its meaning." *Suth. on Stat. Const.*, secs. 237, 321.

Section 351, *Compiled Laws*, authorizing the county commissioners to take evidence as to claims against the county, confers only quasi judicial powers, necessary to the proper discharge of ministerial duties, and is not in conflict with the organic act. *Mechem on Public Officers*, sec. 639.

The defendant can not be compelled to make a second deed to the same land under the same sale, while the first deed remains uncanceled. *Smithee v. Mosely*, 31 Ark. 425, 426; *State v. Bowden*, 18 Fla. 19; *State v. Trustees*, 1 & 2 Ohio, 301; *Assurance Co. v. Supervisors*, 24 Barb. 167; *High on Extraordinary Rem.*, sec. 14.

Plaintiff has been guilty of such bad faith, laches, omissions, and negligence that his claim is entitled to no consideration. *People ex rel. Kohler v. Hays*, 5 Cal. 68, 69; *High on Extra. Rem.*, secs. 16, 26, 30 b; *People v. Seneca Common Pleas*, 2 Wend. 264; *People v. Delaware Common Pleas*, Id. 256; *Territory v. Potts*, 3 Montana, 364; *Walcott v. Mayor*, 51 Mich. 249; *State v. R. R. Co.*, 43 N. J. Law, 505; *True v. Melvin*, 43 N. H. 503.

Any alleged errors in the findings of law in this case to which no exceptions were taken below should not be considered. *Peabody v. McAvoy*, 23 Mich. 526; *Cooper v. Schlesinger*, 111 U. S. 148; *Crabtree v. Segrist*, 6 Pac. Rep. 203.

The statement in the record that the relator excepts to the findings of law is not certified by the judge, nor in the bill of exceptions, nor is it a part of the record, and can not be considered. *Young v. Martin*, 8 Wall. 356, 357.

McFIE, J.—On the first day of December, 1890, the petitioner, Charles H. Gildersleeve, filed his peti-

tion for a writ of mandamus, alleging, in substance, that one Santiago Baca, then sheriff and ex officio collector of said Bernalillo county, did on the first day of March, 1886, sell certain real estate, described as the Espiritu Santo Spring land grant, "for the taxes, interest, and costs due thereon for year 1885; that W. S. Moore became the purchaser, and that certificate of purchase was issued and delivered to said Moore by said sheriff; that on the twenty-fifth day of June, A. D. 1888, said Moore, for a valuable consideration, transferred and assigned said certificate by his written assignment to petitioner, and that said assignment was duly entered of record in the record of tax sales; that said real estate had not been redeemed from sale, and that petitioner was entitled to a deed for said property March 1, 1889; that on the first day of December, A. D. 1890, petitioner presented said certificate of purchase and assignment to the defendant, Jose L. Perea, collector of Bernalillo county, who was the successor in office of said Baca, and demanded a deed for the property, which was refused. Upon this petition alternative writ of mandamus issued, commanding the defendant to execute the deed, or show cause why he did not do so. Respondent filed a return to this writ in the nature of an answer, showing cause, admitting the sale of the property, and that it was purchased by said W. S. Moore, admitting that defendant was successor in office of Santiago Baca, as sheriff and ex officio collector of said Bernalillo county, and that he had refused to execute and deliver to petitioner said deed, but denying that said Moore had assigned said certificate to petitioner, as alleged. Respondent avers that in the month of August, 1888, said W. S. Moore died, leaving Barbara A. Moore, his wife, as his sole legatee; that on the twenty-seventh day of April, A. D. 1889, one George H. Moore, as administrator with the will annexed of the estate of the said W. S. Moore pre-

sented to the board of county commissioners of Bernalillo county his affidavit, whereby it was made to appear to the satisfaction of said board that said George H. Moore, as such administrator, and Barbara A. Moore, sole legatee, were entitled to a deed from the said respondent for the said real estate, and that the certificate of sale was lost; that said board thereupon ordered this respondent to make a conveyance of said real estate to said George H. and Barbara Moore, as administrator and sole legatee as provided by section 2892 of the Compiled Laws of New Mexico; that in obedience to the order of said board, as was his duty, respondent immediately made such deed, and delivered the same to said George H. Moore and Barbara A. Moore, conveying said property to them. The deed is filed as an exhibit to said return. Respondent, answering, further avers that up to the time of the execution and delivery of said deed there was no record or entry of such pretended assignment, and that defendant had no knowledge or information of the existence of any such assignment. On the sixth of December, A. D. 1890, and by agreement of parties, the trial was had by the court without a jury, and resulted in a refusal of the peremptory writ and a judgment for defendant. Petitioner brings the case to this court by writ of error, seeking a review and reversal of the judgment of the court below. The findings of fact and the conclusions of law of the lower court are found in the record, and, as it is conceded by the briefs of counsel on both sides that the findings of facts by the court below were correct, we will adopt them here for the purpose of this review.

“Facts: (1) That the levy on the Espiritu Santo Spring land grant and the sale thereof for taxes was made as set forth in the alternative writ, and admitted in the answer thereto, and that a certificate of said sale was duly executed and delivered to W. S.

Moore, the purchaser. (2) That the relator furnished said Moore with money to buy said property at said sale, and that said Moore in making such sale acted as agent of the relator. (3) That the relator did not appear as the purchaser at said sale, because, among other reasons, which were not stated, he claimed to be a part owner of the property. (4) That at some time subsequent to the sale, and before the expiration of the time for redemption from said sale, said Moore wrote his name on the back of the certificate, and delivered it to the relator. (5) That said Moore died some time in the month of August, 1888. (6) That on the twenty-seventh day of April, 1889, one George H. Moore, as the administrator with the will annexed of the estate of the said W. Scott Moore, presented to the board of county commissioners of Bernalillo county his affidavit, a copy of which is filed with the defendant's answer and marked 'Exhibit A;' that thereupon said board made an order, a copy of which is filed with the defendant's answer, and marked 'Exhibit B;' and that thereupon the defendant in obedience to said order, made, executed, and delivered to the said George H. Moore as administrator, and the said Barbara A. Moore as sole legatee, under the last will of the said W. Scott Moore, the deed, of which Exhibit C, filed with the answer, is a copy, and that up to the time of execution, delivery, and record of said deed there was no record or entry in the office of the said probate clerk of said county of any assignment of the said certificate of sale. (7) That the said deed was recorded on the first day of May, 1889; that on the second day of May, 1889, the relator wrote on the back of the certificate the assignment, which appears above the signature of the deceased, Moore, and caused the same to be entered on the records of sales in the probate clerk's office of Bernalillo county, New Mexico. (8) That on the first day of December, 1890, the relator

presented said certificate to the defendant, and demanded that he should, as sheriff and ex officio collector of Bernalillo county, execute to him a deed for said real estate, and that defendant refused to make such deed. (9) That said land was not redeemed from such sale by any one prior to the first day of December, 1890."

There are some general principles applicable to writs of mandamus which should be borne in mind from the beginning of the inquiry in this cause. We will here state them: First, that, to entitle the relator to the writ, he must first show himself to be entitled legally to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; second, that the person to whom the writ is directed still has it in his power to perform the duty required; third, that whatever is required to be done by the said relator as a condition precedent to the right demanded must be shown affirmatively to have been done by him. *People ex rel. Stevens v. Hayt*, 66 N. Y. 606; *People ex rel. Luger v. Geroy*, Wood, Lim. pp. 37, 38; *Brownsville v. Loague*, 129 U. S. 493.

Keeping in mind these principles, we will first inquire, what legal right has the relator shown by his petition that entitles him to demand of the respondent a conveyance to him of the land in question? The relator does not deny that Moore purchased the property at tax sale, but seeks to recover on the ground that Moore assigned the certificate of sale to him. Any rights that relator may have, therefore, accrued to him as the assignee of the certificate, and not as the purchaser of land through the agency of Moore. Such are the allegations of the petition, and of course the proof must correspond, to be available. The respondent denies the validity of the assignment, and therefore

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the right of the relator to recover by virtue of the assignment is questioned. Relating to the assignment of such certificates of sale, and the legal effect thereof, section 2885, Compiled Laws, provides that "the certificate of sale shall be assignable by indorsement, and the assignment thereof, when entered upon the records of sale in the office of the probate clerk, shall vest in the assignee or his legal representatives all the right and title of the original purchaser." That such certificates of sale are assignable by indorsement is undoubted. But what constitutes assignment by indorsement, within the meaning of the section above quoted? Plaintiff in error insists that to write the name upon the back of the certificate is sufficient, while the defendant in error contends that the word "indorsement" has such meaning only when applied to negotiable paper; that, when applied to such certificates or written instruments other than negotiable paper, the words "assignable by indorsement" mean that the assignment itself, as well as the name, should be written upon the instrument. Plaintiff in error refers us to 1 Bouvier's Law Dictionary, page 790, but we find that Bouvier gives more than one definition, and seems to make a distinction, based on negotiability, that tends to support the contention of the defendant in error. Bouvier says: "That which is written on the back of the instrument in writing, and which has relation to it; writing one's name on the back of a promissory note or other negotiable instrument." Anderson's Dictionary of Law, on page 538, gives the following definitions of "indorse:" "To write upon the back of any instrument or paper, as to indorse a deed, with the date or book of its record; to indorse a pleading filed with the time of receipt, payment of costs, etc.; to indorse a warrant of arrest prior to action under it in another county. * * * While the word has no definite, technical meaning, other than

that of some writing 'upon the back,' its particular meaning is always determined by the context, if in writing, and by its connection if in spoken words. The word 'indorsement' has its primitive and popular sense of something written on the outside or back of a paper, on the opposite side from which something else had been previously written, when the context shows that that sense is necessary to give effect to the pleading or other instrument in which it occurs. (2) For the person to whom or to whose order a bill of exchange or a promissory note is payable to write his name upon the back of such bill, in order to assign over his property therein." Rapalje & Lawrence's Law Dictionary, at pages 648, 649, gives the following definition: "First. To 'indorse' is to write something upon the back of an instrument. * * * 'Indorsement' signifies either the act of indorsing or the writing itself." In the case of *Com. v. Spilman*, 124 Mass. 329, the following language is used: "But the word 'indorsement' has not a definite, technical meaning in law or in fact other than 'upon the back,' and its meaning is always determined by the context, if in writing." From these general definitions we are inclined to agree with the defendant in error that to write the name upon the back of an instrument would be a proper assignment when applied to negotiable paper, but, as applied to nonnegotiable instruments, such as certificates of purchase at tax sale, the terms of assignment should be written upon the instrument, as well as the name of the assignor, unless there is a specific provision of law that to sign the name upon the back of the instrument is a sufficient assignment to transfer the right, title, and interest of the owner to the assignee. In support of his contention plaintiff in error points to the fact that the supreme court of Wisconsin has repeatedly held that to write the name upon the back of the certificate of purchase at tax sale was

a legal and sufficient assignment to vest in the assignee all the right, title, and interest of the purchaser in such certificate; and it is asserted that the Wisconsin statute is similar in terms to section 2885 of the Compiled Laws of New Mexico. There is a material difference between section 1140 of the Wisconsin statutes and section 2885 of the Compiled Laws of this territory. Section 1140 of the statutes of 1859 of Wisconsin provides that such certificate "may be assigned by the purchaser by writing in blank his name on the back thereof." This statute specifically provides that writing the name upon the back of such certificate is a legal assignment. The provisions of the statute control. The decisions of the supreme court of Wisconsin, therefore, upon this statute, are not a construction of the language of our statute, nor of a statute similar to ours, and are therefore not in point in this case.

Our attention is called to the case of *Swan v. Whaley et al.*, 35 N. W. Rep. (Iowa), 440, which it is urged supports the plaintiff in error's view that "assignment" by endorsement means writing the name upon the back of such certificates of purchase. This was an action in equity to cancel a deed. It appears that J. W. Phillips and Clark Fairfield were partners, and purchased a number of tracts of real estate at tax sale, Phillips taking the certificates in his own name, and, upon a division of the certificates, signing his name upon the back of those delivered to Fairfield. Fairfield, claiming to be the owner of the certificates, served notice of the expiration of the period of redemption provided by the statute, and afterward, by a complete assignment written over his name, he assigned the certificate to Whaley, who applied for and obtained a deed to the property. It was contended upon the trial that Fairfield was not the "lawful holder of the certificate," and therefore the notice served by him of the

expiration of the period of redemption was invalid, but the court held that he was the lawful holder of the certificate at the time the notice was given, and therefore had a right to give the notice. The court says: "Section 880 of the Code is as follows: 'The certificate of purchase shall be assignable by indorsement and the assignment thereof shall vest in the assignee or his legal representatives all the right and title of the original purchaser.' The contention is that this section requires a formal assignment, transferring to the assignee all the rights and interest of the purchaser, to be indorsed upon the certificate. So far as the objection that Fairfield was not the proper party to give notice to redeem is concerned, we deem it unnecessary to inquire as to the soundness of that position. Section 894 provides that the notice shall be given by the lawful holder of the certificate. By the 'lawful holder' is meant the one who in law is the owner of the certificate, and entitled to the rights and benefits which may accrue under it." It may be admitted that the court in that case, which was an action at equity, refused to cancel the deed executed upon the certificate thus assigned; but we think that the court did not go to the extent in that case of holding that such an assignment was the assignment contemplated by the statute. Indeed, the decision seems to show that the court avoided passing upon that particular question for the reason that it was unnecessary in the case under consideration. The court held that, for the purposes of that action, the assignment could not be questioned, because no assignment was necessary to warrant the treasurer in executing the deed, inasmuch as a law provided that the "lawful holder" was entitled to the deed upon producing the certificate.

The court, placing it upon the following ground, says: "A right in and to the certificate which would be enforceable in law can be created without the execu-

tion or recording of any assignment. The object of the provision is to afford the treasurer certain evidence of who is entitled to the deed when the right to one accrues. If, however, he should, without having any evidence of assignment, execute a deed to the one who in fact and in law was entitled to receive it, the question of its validity would not be affected by the fact that he acted without such evidence." But, if it be admitted that the supreme court of Iowa holds that to write the name of the assignor upon the back of the certificate is sufficient assignment to vest in the assignee all the right, title, and interest of the purchaser, it would not affect the contention in this case, for the reason that there is an important difference between the provisions of the Iowa code and the Compiled Laws of New Mexico upon that subject. It will be observed that the Iowa code provides that, when the assignment is made, the right and title of the assignor immediately vests in the assignee. There is no contingency whatever. There is a provision for the recording of the assignment, but the assignment is in no way conditional upon the recording of the instrument. Section 2885, Compiled Laws, provides that, "when the assignment of a certificate is entered upon the record of sales in the office of the probate clerk, it shall vest in the assignee or his legal representatives all the right and title of the original purchaser." The assignment,

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therefore, under the statute of New Mexico, is conditional upon something being done by the assignee to have the right and title of the original purchaser vest in him, and, until this is done, the right and title of the original purchaser does not pass to the assignee. It was the obvious intention of the framers of the statute of New Mexico to secure the entry of all assignments of certificates of tax sales, and in order to prevent delay, and secure prompt entry of such certificates in the record of tax sales in the office

of the probate clerk, the statute provides, in effect, that the right and title of the original purchaser of such certificate shall be withheld until such time as the assignee records such assignment. The assignee may fail or refuse to have such record entry made, but if he does, and the rights of innocent parties intervene, he must suffer the consequences. It will be observed from the findings of fact that Moore wrote his name upon the back of the certificate some time prior to his death. The relator, seeming to recognize the fact that such assignment was not a compliance with the statute, more than three years after the certificate was issued to Moore, and several months after Moore's death, wrote a formal assignment above the name of Moore upon the back of the certificate. Plaintiff in error contends that, by virtue of Moore's having signed his name on the back of the certificate, he was authorized to write such assignment above the name, and a number of authorities are cited in support of that position.

We have examined the authorities cited by the plaintiff in error, and are of the opinion that they are applicable alone to what may be termed money demands or negotiable paper. As to such instruments, the signing of the name on the back carries with it the authority to write an assignment over the name. But certificates of purchase, under the statute of New Mexico, are not negotiable instruments. In *Eaton v. Supervisors*, 44 Wis. 492, and *Horn v. Garry*, 49 Wis. 469, it is distinctly held that they are not negotiable instruments. In *Watson v. Phelps*, 40 Iowa, 483, it is also held that such certificates are not negotiable, although the supreme court of that state holds that such certificates are simply choses in action, and may be transferred and sold as personal property. Our conclusion, therefore, is, as was concluded by the court below, that the assignment of the certificate of purchase insisted on by the plaintiff in error was not such an assignment as

vested in him the right and title of Moore up to the time of Moore's death, and it could not thereafter be vested by the assignee's writing an assignment over Moore's signature. Such authority, even if it existed before, expired upon the death of Moore. *Clark v. Sigourney*, 17 Conn. 523; *Miller v. McDonald*, 72 Ga. 20; *Galt v. Galoway*, 4 Pet. In the case of *Dolph v. Barney*, 5 Ore. 193, it is held: "A certificate of purchase at a tax sale does not convey a legal title. It is, however, evidence of an equitable title to the land, and enables the purchaser to call in the legal title." These certificates are the foundation of title, and may ripen into full and complete legal title. Upon failure to redeem, the purchaser is enabled to draw to himself, by virtue of the certificate of purchase, a perfect legal title. Assignments of such certificates are required to be entered of record in this territory before the title to them vests in the assignee, and they are too important instruments to be transferred and sold, under the liberal provisions of the law governing the sale and transfer of negotiable instruments. We can not consent to so construe the statute as to authorize the filling up of an assignment by the assignee over a signature upon the back of such instrument. Such assignment should speak for itself, and, in all cases where such assignment is made, its terms should be written upon the instrument, in order that when it is entered in the record of sales of the probate clerk it may clearly show the intention of the assignor. This case emphasizes the necessity of such a construction of the statute. The assignment was written over the alleged signature of Moore after his death. In such a case it is completely within the power of the assignee to frame the assignment so that it might operate as a conveyance, whether it was so intended by the deceased or not. It is beyond the power of the assignor to explain under what circumstances, and with what intention, the name was written

upon the back of the certificate. His mouth is closed, and, as to facts occurring before death, section 2082, Compiled Laws, closes the mouth of the adverse party also, unless his testimony is corroborated. We do not hold that the signing of the name on the back of the certificate, for a valuable consideration, with the intention of transferring the certificate, would not give the holder such an equitable interest in the certificate and the rights accruing by virtue of it as would enable him to enforce them in a court of equity, but we are of the opinion that the transfer of the certificate, under the circumstances shown in this case, did not operate to convey the legal title therein to the relator, so as to enable him to maintain an action of mandamus.

Passing to the second point above indicated, was it within the power of the respondent at the time the suit was brought to perform the act required, and execute the conveyance of the land? The proof shows that the

CERTIFICATE of purchase: mandamus to compel sheriff to make deed.

respondent, as collector of the county of Bernalillo, had, prior to the institution of the suit, executed a conveyance to George H. Moore and Barbara A. Moore of the same land the relator sought to compel respondent to convey to him. Therefore, if the peremptory writ of mandamus was awarded by the court, the officer would have been compelled to execute a second deed to the same land to different parties. The return of the respondent sets out fully the proceedings before the board of county commissioners of Bernalillo county, by whose order he was commanded to execute the deed to George H. Moore and Barbara A. Moore, and to the return is appended, as an exhibit, the deed itself, which, by its recitals, sets out fully the proceedings before the board. This deed was acknowledged on the twenty-ninth day of April, 1889. The time of redemption having expired on the first day of March, 1889, it was executed by the respondent after the expiration of the

time for redemption. The proceedings set forth in the answer, and also in the deed itself, are regular, and in strict compliance with the provisions of the statute, which is as follows: "Section 2892. At any time after the expiration of the term of three years from the date of the sale of any real estate for taxes, under the provisions of this chapter, on demand of the purchaser, his heirs or assigns, and on presentation of the certificate of sale, the collector then in office shall make out a deed for each lot or parcel of real estate sold and remaining unredeemed, and deliver the same to the purchaser, his heirs or assigns. Whenever any certificate given by the collector for real estate sold for taxes shall be lost or wrongfully withheld from the owner, the board of county commissioners may receive evidence of such loss or detention, and, on satisfactory proof of the fact, may cause a deed, as aforesaid, to be executed to such person as may appear by them rightfully entitled thereto. Section 2983. The deed shall be signed by the collector in his official capacity, and attested by his official or private seal, and be acknowledged by him before some competent officer, and, when substantially thus executed and recorded in the proper register of conveyances, shall vest in the purchaser all the right, title, interest, and estate of the former owner in and to the land conveyed, and also all the right, title, interest, and claim of the territory and county thereto, and shall be prima facie evidence in all courts in the territory in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: First, that the real estate conveyed was subject to taxation for the year or years stated in the deed; second, that the taxes were not paid at any time before the sale; third, that the real estate conveyed had not been redeemed from the sale at the date of the deed; fourth, that the property had been listed and

assessed at the time and in the manner required by law; fifth, that the taxes were levied according to law; sixth, that the property was advertised for sale in the manner and for the time required by law; seventh, that the property was sold for taxes, as stated in the deed; eighth, that the grantee named in the deed was the purchaser or the heir at law, or the assignee of the purchaser; ninth, that the sale was conducted in the manner required by law."

These provisions of the law are very explicit, and the respondent, being the only officer who could execute the deed, is necessarily contemplated by the statute. Under the order of the board, it was clearly his duty to execute the deed set out in the answer, and he could have been compelled to do so in case of his refusal. Upon the death of Moore, his legal representatives found that the records showed the purchase of the land by Moore. There was nothing upon the record to indicate any assignment of the certificate of purchase. The administrator had a right to assume, in its absence, that the certificate was lost, and, therefore, make proof of the loss, in order that the parties entitled thereto might obtain a deed to the land. To give jurisdiction in such a case to the board of county commissioners it was only necessary that the proof of loss of the certificate should be satisfactory to them. If it was, they had a clear right, under the statute, to assume jurisdiction, and pursue it to the extent of ordering a deed to be made. The sheriff was powerless to resist the order of the board. It was his duty to make the deed. The remedy provided by statute was strictly pursued, and the deed was made as required by law. The sheriff, by the execution of that deed, exhausted his power in the premises, and, so long as that deed remains uncanceled, it is clear that the respondent has no power to execute a deed to the relator. That being true, it was not his duty to execute a second deed upon the demand of the

relator, and it would have been improper for the court to compel the respondent to execute a second deed. The first deed was a complete conveyance of title, and such it must remain until such time as it is canceled by legal proceedings. To have executed a second deed would have been to cast a cloud upon the title of the parties to whom the prior deed had been executed, and it was perfectly proper for the court to refuse to do so.

It will be observed that the same section of the statute that directs the collector to execute the deed to the purchaser at a tax sale contains the provision giving jurisdiction to the county commissioners to order the collector to execute a deed to the purchaser in all cases where the certificate of purchase is lost or wrongfully withheld. The relator is chargeable with notice of this provision of the law, and it was his legal duty to make a record entry of such assignment, as such record would have protected him from the operation of the latter provision of the statute, and by complying with the provisions of the statute he could have placed it beyond the power of the board of county commissioners to order a deed to be executed to George H. and Barbara A. Moore, and render the deed void if executed. He failed to comply with the statute until after the deed had been executed, and the respondent so recites in his answer that up to the time the deed was executed no assignment had ever been entered, and he had no knowledge of any assignment having been made. Under such circumstances, the relator has, by his own laches, slept upon his rights until title to the land became vested in innocent parties, and his rights, whatever they may have been prior to the execution of the deed by the collector are postponed to the rights of the grantees in the collector's deed. It can not avail the relator, after such deed is made, to allege that the certificate was not lost. So long as the proceedings before the board of county commissioners and

the deed under them remain in force, the court was bound to respect them, and properly refused to practically destroy rights accruing under them in a collateral proceeding.

The relator has failed to show affirmatively performance of conditions precedent to his right of recovery. The evidence shows that the alleged assignment of the certificate to him was not entered in the record of sales in the probate clerk's office until May 2, 1889. This was about eight months after the death of Moore, and after the execution, delivery, and recording of respondent's deed to George H. and Barbara A. Moore. Under the statute, the right and title of the purchaser and owner of the certificate does not vest in the assignee until the assignment is "entered in the record of sales." This was not done until after the death of Moore. Suppose Moore had signed his name upon the back of the certificate, it would be a mere naked transfer of an equitable interest, and the right and title in the certificate was still in Moore at the time of his death. The right and title of the purchaser in the certificate, which, under the law, was sufficient to draw to it the legal title to the land after the period of redemption had expired, immediately passed to Moore's legal representatives under the will, and from that time third parties became parties in interest in the certificate, and all the benefits accruing by virtue of Moore's purchase of the land, and they are necessary parties thereafter to all efforts to divest or cloud their title. The time of redemption expired March 1, 1889, and, the relator still failing to have the assignment entered in the record of sales, Moore's legatee and legal representative proceeded to acquire, and did acquire, title to the land in the manner provided by the statute. It is objected by plaintiff in error that he was not a party to the proceedings under which the former deed was executed, and therefore he is not bound by them. That may be

true to the extent that there may still be a remedy of which he is not deprived, but it does not follow that his remedy is by mandamus, which, as in this case, if successful, would operate upon and affect injuriously the real parties in interest, not parties to the record, without a hearing. The weakness of plaintiff in error's position lies in the fact that he failed to comply with the plain provisions of the statute, and he now seeks to avoid the effect of such failure. In the case of *Reeds v. Morton*, 9 Mo. 878, it is said: "But the party has withheld his instrument from record when he was required by law to place it there, and we can see that the owner of the land may have sustained an injury in consequence of his neglect. But, according to the principles above asserted [relating to the strictness required in this class of cases], we do not feel called upon to give reason why this thing should have been done. He who wishes to obtain an estate worth thousands of dollars for less than ten dollars, and under and by virtue of the law, is not to be permitted to ask why he should be required to do this or to do that. It is an answer that it is required by law. He claims by the law, then by that law let his pretensions be judged. The placing it on record after the time for redemption had expired was a nugatory act; it should have been seasonably recorded, and the failure to do so renders it void, and, by consequence, the auditor's deed." We think this reasoning is applicable to this case, in so far as it relates to the effect of a failure to record the alleged assignment. The statutes of Iowa, Wisconsin, and other states provide that the right, title, and interest of the original purchaser at a tax sale shall immediately vest in the assignee upon assignment of the certificate, but that is not true of an assignment of such certificate in New Mexico. The vesting of the right and title of the original purchaser in the assignee is conditional. The assignee was required to comply

with the conditions imposed by law, which in this case he clearly failed to do, and he can not be permitted to escape the consequences of his own neglect to the injury of innocent parties.

This case forcibly illustrates the wisdom of our statute. It was evidently intended to secure the prompt entry of record of all assignments of tax sale certificates, in order that the officer might know to whom he should execute the deed. Such assignments should be entered of record also to prevent the heirs of a deceased purchaser from being misled into presuming, in the absence of the certificate, that it is lost, and therefore apply for a deed under sections 2892 and 2893 of the Compiled Laws.

It seems to us that justice demands such a construction as we have placed upon the above statute, and, inasmuch as the relator by his failure to comply with the law has made himself responsible for the intervention of the rights of innocent parties, he should be remitted to such remedy as will preserve and determine the rights of all parties in interest in the premises. The courts have large discretionary powers in mandamus cases, and are very reluctant to grant the writ when it may injuriously affect the rights of third parties who are not before the court, and for that reason have often refused it. *Oakes v. Hill*, 8 Pick. 47; *Ham v. Toledo, etc., Railroad Co.*, 29 Ohio St. 174; *Merrill*, Mand., sec. 33. It has been refused when the granting thereof might involve such third parties in difficulties and hardships, or might give advantage over them, which might embarrass them in suits growing out of the question. *People v. Forquer*, Breese, 68; *People v. Curyea*, 16 Ill. 547. The legal effect of the deed executed by the respondent was to vest in the grantees all the right and title of the former owners and of the county and territory. The grantees are the legatee and legal representative under the will of the deceased Moore. Section 2082, Compiled Laws, is as follows:

“In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.” It is contrary to the spirit of this statute to allow a recovery in a suit against heirs of a deceased person upon the uncorroborated testimony of the adverse party. It is not necessary to consider whether this case falls within the letter of this statute or not; the facts show it to be within its spirit. The relator claims by virtue of an assignment, and the relator alone testifies that there was such an assignment. If the suit was brought against the heirs of Moore, who are the real parties to be affected by it, there could be no recovery upon the testimony alone of the adverse party; but by bringing this suit the relator seeks to accomplish the same result, and avoid the force of the statute, by making the officer respondent, instead of the representative of the deceased. But, more than this, the court finds that the relator was one of the owners of the land sold for taxes, that the relator furnished Moore with the money to purchase said property, and that the reason the relator did not purchase the land himself was because he was part owner. These facts are inconsistent with the allegations of the petition, but, if true, the relator discloses an effort on his part to secure an undue advantage of his cotenants, and, so far as his interest in the land is concerned, a purchase under such circumstances would merge in his former title, and be a redemption. Good faith must always appear, or the court will refuse the writ. The peremptory writ was properly denied.

We find no error in the proceedings, and the judgment of the court below is therefore affirmed, with costs.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ., concur.

[No. 482. August 24, 1892.]

**TERRITORY OF NEW MEXICO, APPELLEE, V.
V. P. EDIE, APPELLANT.**

CRIMINAL LAW—RAPE—EVIDENCE—INSTRUCTIONS.—On a prosecution, on indictment for rape, under section 1, chapter 24, Laws, 1887, where there was no evidence tending to show that the prosecutrix “through idiocy, imbecility, or unsoundness of mind, either temporary or permanent,” was incapable of giving consent, it was not error for the court in its charge to read all of said section to the jury, where the court afterward fully explained to the jury the law governing the commission of the crime defined in the section, since it does not embrace several distinct offenses, but merely defines the different means by which the same offense may be committed.

ID.—EVIDENCE—INSTRUCTIONS.—On such prosecution, where the evidence was that the defendant had importuned the prosecutrix, a girl of fifteen years of age, to drink wine shortly before the offense was committed, and that she became dizzy from the effects of it, the court properly submitted to the jury the question whether the deed was accomplished by producing stupor, and did not err in charging them upon the degree of stupor necessary for the prosecution to prove to warrant conviction.

ID.—INDICTMENT—EVIDENCE—INSTRUCTIONS.—Where, on such prosecution, neither count of the indictment contained any charge of threats, but the first count distinctly charged that the defendant violently and feloniously made an assault upon the prosecutrix, “and against her will, and by forcibly overpowering her resistance, feloniously did ravish and carnally know,” and the prosecutrix testified that the crime was accomplished by threats of personal injury if she did not yield, and the use of force, an instruction that if the jury believed from the evidence beyond a reasonable doubt that the defendant did carnally know the prosecutrix, although she did not make the utmost resistance of which she was capable, they might find defendant guilty, provided they believed beyond a reasonable doubt that the defendant threatened to use force and do her great bodily harm if she did not yield, and that she did yield through fear defendant would do her such injury, was not prejudicial to defendant.

ID.—INSTRUCTIONS, WHEN NOT PREJUDICIAL ERROR.—On a prosecution for rape, a defendant who admits the fact of criminal intimacy with the prosecutrix can not complain of an instruction that it contains an imperfect statement of what is necessary to constitute such intimacy.

ID.—EVIDENCE—CORROBORATION—INSTRUCTIONS.—On such prosecution, where it was in evidence that the prosecutrix told her mother of the commission of the deed soon after its occurrence, it was not error for the court to instruct the jury that such fact was a corroborating circumstance, tending to sustain the truth of her statements.

ID.—INSTRUCTION, NOT PREJUDICIAL, WHEN.—An instruction, in such case, that, if the jury believed from the evidence, the prosecutrix made no outcry, at the time the offense was alleged to have been committed, and made no complaint of the offense to others, but concealed it for a considerable time thereafter, they should take this circumstance into account, with all the other evidence, in determining the question of the guilt or innocence of the accused, was not prejudicial to defendant, especially not where the defendant himself introduced evidence to show that the prosecutrix was a girl whose character for chastity was not above suspicion.

ID.—INSTRUCTIONS, WHEN PROPERLY REFUSED.—Instructions embodying the same idea as those previously given by the court may be properly refused.

ID.—CONFLICT OF TESTIMONY—VERDICT.—On a prosecution for rape, where there is a direct conflict between the testimony of the prosecutrix and of defendant as to whether the act of criminal intimacy, admitted by defendant, was committed by force and against her will or not, the verdict of the jury will not be disturbed.

ID.—VERDICT, IRREGULARITY OF, WILL NOT BE SET ASIDE FOR, WHEN.—Where it appeared on such trial that, after the jury had retired for deliberation and had reached a verdict, one of the jurors withdrew from the jury room into the court room and had an officer write out the verdict, dictated in substance by the juror, who returned with it to the jury room, and a copy of the same was returned into court, signed by the foreman, as the verdict of the jury, and it was not contended and did not appear that the form so prepared had anything to do with the jury's deliberations, or that the defendant's rights were prejudiced thereby, though it was an irregularity highly censurable, the verdict will not be set aside.

APPEAL, from a judgment convicting defendant of rape, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The facts are stated in the opinion of the court.

NEILL B. FIELD for appellant.

Where the statute defines several distinct offenses, and the indictment covers only one of such offenses, it

is error to embody the entire statute in the charge. *Miller v. State*, 18 S. W. Rep. (Tex. App.) 197; *Jones v. State*, 3 Id. (Texas) 478; Proffat on Jury Trials, sec. 329.

There was a total failure of proof upon the second count, and it was error to let the case go to the jury on that count. Endlich on Int. Statutes, sec. 329, and cases cited.

Instructions based upon a state of facts of which there is no evidence are erroneous. *Beavers v. State*, 15 S. W. Rep. 1024; *State v. Whittaker*, 12 Pac. Rep. 106; *Burney v. State*, 1 S. W. Rep. 458; *Chambers v. People*, 105 Ill. 409; *People v. Bird*, 60 Cal. 7.

The court erred in the sixth paragraph of the charge in telling the jury that fear of violence from the defendant would excuse the prosecuting witness from communicating the fact of the commission of the crime to others, instead of telling them it was for the jury to say whether under all the facts the failure to communicate the fact of the commission of the crime was excusable. Proffat on Jury Trials, secs. 322, 323, and cases cited; Id. 327.

The charge of the court should be limited to the case made by the evidence, and should omit all issues not arising upon the testimony. *Hartwell v. State*, 3 S. W. Rep. (Tex.) 715; *Boddy v. State*, 14 Tex. App. 528; *Hardin v. State*, 13 Id. 192.

The court ought to have given the instructions asked by defendant, as they were abstractly correct, applicable to the case, and not covered by the charge of the court. Proffat on Jury Trials, sec. 313, and cases cited.

It was misconduct on the part of the jury, such as calls for a reversal, that a member of the jury should leave the jury room and procure a person not a member of the jury to write out a form of verdict, such separation and communication being in direct disobe-

dience of the orders of the court. *People v. Brannigan*, 21 Cal. 337; *State v. Prescott*, 7 N. H. 287; *Reily v. State*, 9 Humph. 654; *McCann v. State*, 9 Smedes & Marsh. 465.

In cases of this character a conviction should never be permitted to stand upon the uncorroborated testimony of the prosecuting witness. Wharton, *Crim. Law*, sec. 565, and cases cited.

See following cases where the courts have refused to sustain verdicts of guilty on charges of rape: *Bueno v. People*; 28 Pac. Rep. 248; *Rhea v. State*, S. W. Rep. 931; *State v. Patrick*, Id. 666; *Rehm v. State*, 16 Id. 338; *Hallis v. State*, 9 South. Rep. 67; *Brown v. Commonwealth*, 82 Va. 653; *Brown v. State*, 76 Ga. 623; *Dickey v. State*, 21 Tex. App. 430; *Gifford v. People*, 87 Ill. 210.

In a case of this character, which is so easily fabricated, and so calculated to arouse prejudice against the defendant as to make it extremely difficult for a jury to weigh the evidence dispassionately, the appellate court should interfere more readily to set aside a verdict as against the evidence, and if it appears against the weight of the evidence it should be set aside. *Connors v. State*, 47 Wis. 523; *State v. Wise*, 50 N. W. Rep. 59; *Montgomery v. State*, 16 S. W. Rep. 342; *Morrow v. State*, 16 S. W. Rep. 652; *Reed v. State*, 11 Id. 372.

Where the evidence is sufficient only to raise a bare suspicion of defendant's guilt, a judgment of conviction should be reversed. *Stevens v. State*, 16 S. W. Rep. 764.

EDWARD L. BARTLETT, solicitor general, and W. H. WHITEMAN for appellee.

It was not error to submit the question of defendant's guilt under the second count of the indictment. The evidence sustains the verdict under that count. 2

Bishop on Crim. Law, sec. 1126; Whart. & Still. Med. Jur. [2 Ed.], secs. 443, 459.

The gist of the charge is that defendant forcibly overcame the resistance of the prosecutrix. How such force was manifested, whether by main strength or by putting her in fear, is immaterial. It is not necessary, or proper, in an indictment to plead evidence. 2 Bish. on Crim. Law, sec. 1125; Wright v. State, 4 Humph. 194.

Misdirection by the court is not error if the jury were not misled. Thomp. on Jury Trials, 2401, 2402; Hilliard on New Trials, pp. 44-260.

Although the second and third instructions may have been good law, it was not error to refuse them, they being contained in the court's charge. Thomp. on Jury Trials, 2352; People v. Strong, 30 Cal. 151; Laber v. Cooper, 7 Wall. (U. S.) 565.

The rule relating to the separation of the jury and communications with the jury has been greatly modified in late years. The rule now is that the party complaining, and asking for a new trial upon that ground must show that prejudice resulted. 2 Graham & Waterman on New Trials, 317; People v. Boggs, 20 Cal. 435; People v. Symonds, 22 Id. 352.

O'BRIEN, J.—V. P. Edie was indicted for rape at the March term, 1891, of the district court for Bernalillo county; pleaded not guilty; was tried, convicted, and sentenced to the penitentiary for the period of five years. A motion for a new trial was made and denied, and the defendant appealed from the judgment. The indictment was drawn under the provisions of section 1, chapter 24, Laws, 1887, and contains two counts. The first count charges that the crime was committed by forcibly overcoming the resistance of the prosecutrix; and the second that it was committed by administering wine, an intoxicating narcotic, whereby, from stupor and weakness, the victim was

prevented from resisting the force used by the defendant to accomplish his purpose. The section of the statute upon which the indictment is founded reads: "Section 1. That a person perpetrating rape upon, or an act of sexual intercourse with, a female, when the female is under the age of fourteen years, or, when over fourteen years of age, through idiocy, imbecility, or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent, or when her resistance is prevented by stupor or by weakness produced by an intoxicating narcotic or anesthetic agent administered by or with the privity of the defendant, is punishable by imprisonment for not less than five years, nor more than twenty years." The grounds of error upon which appellant relies for a reversal are—First, misdirections given by the court to the jury; second, the insufficiency of the evidence to support the verdict; third, irregularities committed by jury in allowing a court bailiff to draw their verdict.

1. There was no evidence received during the trial tending to show that the prosecuting witness, "through idiocy, imbecility, or unsoundness of mind, either temporary or permanent," was incapable of giving consent. The court, in its instructions, read the entire section above set out to the jury. This appellant claims was erroneous, as it had a tendency to impress upon the minds of the jurors the idea that it was their province to determine, from the mere appearance of the prosecuting witness upon the stand, whether she was, "through idiocy, imbecility," etc., incapable of giving consent, in the absence of any evidence favoring the existence of such a state of facts. The contention of the appellant would be meritorious if the section read embraced several distinct offenses; but it does not. It merely defines the various means by which the same offense

RAPE: evidence:
instructions.

may be committed. Besides, the court afterward fully explained to the jury the law governing the commission of the crime as defined in the section. And in such case it is not error for the court to read to the jury all the section of the statute in pursuance of which the indictment is drawn. *Hobbs v. State*, 7 Tex. App. 117.

Appellant further insists that the court erred in permitting the case to be submitted to the jury upon the second count, over his objection, because he contends there was a total failure of proof to support that count. There was evidence that the defendant had importuned the prosecutrix to drink wine a short time before the commission of the alleged offense, and that she had taken the wine three or four times. She also testified that it made her dizzy: "It made me dizzy; for three or four days I was out of my head." To what extent the prosecutrix, a girl of fifteen years of age, was affected by the use of the wine, was a question of fact to be determined by the jury, from all the evidence before them; and we see no error in the court's submitting that count to them upon such evidence, and in instructing them upon the degree of stupor, or the extent of the weakness, essential for the territory to prove, in order to warrant a conviction under that count.

The defendant insists that the court erred in giving instructions to the jury in reference to threats of personal violence, on the ground that there was no evidence of such threats being used before the commission of the act; "and that the idea embodied in the charge was calculated to lead the jury to believe that threats of personal violence, made subsequent to the act of intercourse, would be sufficient to excuse the prosecutrix from making the utmost resistance at the time the act was committed." The court's charge

upon this point is, omitting the name of the female, as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the prosecutrix, although she did not make the utmost physical resistance of which she was capable to prevent such intercourse, provided the jury believe beyond a reasonable doubt that the defendant threatened to use force and do her great bodily injury in case she did not submit, and that she did submit to sexual intercourse through fear that the defendant would do her great bodily injury." The prosecutrix had testified: "When he got to his place, I wanted to go home; but he would not let me go home. He just pulled me in. He says, 'I have to go in;' and I told him that I did not want to go in. I told him I wanted to go home. He says, 'No; you won't.' He says, 'I won't let you go home.' Then he pulled me in, and locked the doors, and would not let me go out." The indictment in neither count contains any charge of threats, but the first count distinctly charges that the defendant violently and feloniously made an assault upon the prosecutrix, "and her, the said —, then and there violently, and against her will, and by forcibly overcoming her resistance, feloniously did ravish and carnally know." Threats may be an element of force, and may be express or implied, and are a matter of proof not always necessary to be pleaded. In the light of all the evidence in this case, it appears impossible to see how this instruction could have injured the defendant.

The chief question for determination under the first count was, did the defendant forcibly overcome the resistance of the prosecutrix. The substance of the testimony upon this point is simple and direct: On the twenty-seventh of November, 1890, at Albuquerque, about 3 o'clock in the afternoon, the defendant took the prosecutrix into his buggy, and drove

about from place to place, stopping at several places where he obtained wine, which he gave the girl to drink. About dark he drove up to his place of business, which contained his private bedroom. Upon getting out of the buggy, he took her by the arm, and pulled her into the bedroom, locked the door, threw her upon the bed, and, by superior force, ravished her. That thereafter he left the room, locked the door behind him, and, after a short absence, returned with oysters and wine, which he gave her to eat and drink. After this the defendant undressed and went to bed, and asked the girl to do likewise. She refused, and he then pulled a pistol, and, saying he would kill her, fired and shot her through the hand. He kept her in his room all night, and in the early morning turned her out, and, giving her \$1.20, told her to go over to old town on the street car, and that if anyone asked her any questions to say that a Mexican had shot her, and that if she told anyone what he had done to her he would kill her. She further testified that similar threats had been used at different times during the evening, before this shooting took place. The threats, whether uttered before or after the commission of the act, tend to show the relations existing between the parties during the time that they were in the bedroom. It is not probable that a man would shoot or threaten to kill the willing victim of his lust. In view of the peculiar facts and circumstances of this case, we can not say that the court erred in giving the instruction.

The court also charged the jury "that in a prosecution for rape upon a female above the age of fourteen years, where the people rely exclusively upon the proof

INSTRUCTIONS,
when not prejudicial error.

that threats and intimidation are employed to gain the consent of the female upon whom the rape is charged to have been committed, such threats and intimidation, together with actual contact of the sexual organs, must

be proved beyond a reasonable doubt, before the accused can be convicted of rape." Appellant complains of this instruction, because actual contact of the organs is declared to be sufficient to constitute an act of sexual intercourse. But the complete act is admitted by the defendant, and he has no right to complain of the imperfect statement of an act of which he admits that he is guilty.

The fifth paragraph of the charge, "If the jury believe from the evidence that the prosecuting witness told her mother of the assault alleged to have been committed on her, at the earliest opportunity, then that is a corroborating circumstance, tending to sustain the truth of her statements," is not open to objection, as it is in evidence, and uncontradicted, that she did tell her mother soon after the occurrence; and neither it, nor the one immediately following, to wit, "If the jury believe from the evidence that, at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and did not complain of the offense to others, but concealed it for a considerable length of time afterward, then the jury should take this circumstance into account, with all the other evidence, in determining the question of the guilt or innocence of the accused, and whether a rape was in fact committed or not," could prejudice the jury against defendant's rights, especially when it is remembered that the defendant introduced testimony for the purpose of showing that the prosecutrix was a woman whose character for chastity was not above suspicion.

EVIDENCE: cor-
roboration:
instructions.

INSTRUCTION,
not prejudicial,
when.

We have carefully examined all, and can discover no material error in any of the instructions given by the court. But appellant urges that it was error for the court to refuse to give instructions 1, 2, and 3 asked by the defendant. The first was a direction to the jury

to find the defendant not guilty on the second count of the indictment for failure of proof to sustain the same. But there was evidence, in the view that we have taken of that count, tending to support it, and it was for the jury to say whether it was sufficient for the purpose or not. The second and third instructions asked to the effect "that to convict the defendant the jury must be satisfied that the resistance of the prosecutrix was forcibly overcome, and that she neither expressly nor impliedly consented," was properly refused, as instructions embodying the same idea had been previously given by the court. This brings us to appellant's second ground of error.

INSTRUCTIONS,
when properly
refused.

2. Was there sufficient evidence to support the verdict? It may be safely stated, as a rule of almost general application, that, in a criminal case, to justify an interference with the verdict, there must be either an absence of competent evidence against the accused, or a decided preponderance in his favor. *People v. Ah Loy*, 10 Cal. 301. If there is no legal evidence to sustain the verdict, it will, of course, be set aside; but where there is proper evidence on both sides, in direct conflict, the court has no right to invade the province of the jury in passing upon the credibility and weight of the testimony. In a well considered case in the state of Missouri, having many traits in common with the one under consideration, in which there was a direct conflict, the girl swearing to an act of sexual intercourse by force and against her will, and the defendant testifying, as the appellant in this case testified, that the act was committed with the girl's consent, the court held that with such conflict of evidence it was not its province to interfere, it being the especial duty of the jury to determine what degree of credibility is to be attached to the testimony of the several witnesses. *State v. Hert*,

CONFLICT of testi-
mony: verdict.

89 Mo. 591. In the state of Virginia a fourteen year old girl testified that her stepfather had sexual intercourse with her, against her will; that he had forbidden her to tell her mother; that she did not tell her for six days thereafter. Notwithstanding the stepfather's denial, he was convicted on the testimony of the girl, and the refusal of the court below to grant a new trial was sustained by the supreme court. *Bailey v. Com.*, 82 Va. 107. The testimony of the girl in this case was amply sufficient, corroborated as it was by proof of complaint made to her mother of the outrage committed upon her within a short time after its commission, to establish defendant's guilt under one or both of the counts in the indictment. It is true the defendant, when testifying in his own behalf, while admitting the act of sexual intercourse, swore positively that the girl freely consented to its commission. Had the jury believed the defendant, he could not have been convicted. But the jury did not believe him, and we can not say that their incredulity was unwarranted.

3. Appellant urges with much earnestness and force his last ground of error, misconduct of the jury, in allowing a bailiff or deputy sheriff to draw their verdict. It appears that the jury, after retiring and deliberation, had agreed upon a verdict. Thereupon one of its members withdrew from the jury room into the court room, where he met a deputy sheriff, whom he requested to write a verdict, dictated, at least in substance, by the juror. The officer did as requested, whereupon the juror returned into the jury room with the form of a verdict so written. The transaction, as evidenced by the record, is thus set out in an affidavit: "Affiant, Thomas S. Hubbell, being first duly sworn, on his oath deposes and says that he is a deputy sheriff in the county of Bernalillo and territory of New Mexico, and

WHEN verdict will
not be set aside
for irregularity.

that on the morning of the twenty-sixth day of March, 1891, about the hour of 6 1-2 o'clock, Jose Dario Aragon, a member of the jury in the above entitled cause, came to affiant in the courthouse, and asked affiant to prepare for him a verdict finding the defendant guilty, and sentencing him to imprisonment for five years in the penitentiary, and thereupon affiant wrote out and gave to said Aragon a verdict in the Spanish language, finding the defendant guilty, and assessing his punishment at imprisonment in the penitentiary for five years. The said Aragon took the said paper so written by affiant, and returned to the jury room. A copy of the same paper was returned into court, signed by the foreman, as the verdict of the jury in said cause." It does not appear, nor is it claimed, except in argument, that the form so written had anything to do with the result of the jury's deliberations. Whilst it is an irregularity, censurable in the highest degree, the extreme rigor with which it was visited under the ancient rule has been considerably relaxed in modern practice. It is now almost universally established that, unless it appears that such interference takes place for some corrupt or sinister purpose, or that such conduct has been prompted by the parties and has resulted injuriously to one of such parties, the verdict will not be disturbed, either in civil or criminal cases. 2 Grah. & W. New Trials, 317; People v. Boggs, 20 Cal. 435; People v. Symonds, 22 Cal. 352. It not appearing that the defendant's rights were either impaired or imperiled by such irregularity, we can not hold it error solely on eloquent counsel's vivid portrayal of the grave injustice that may sometimes result from such misconduct. Finding no errors in the record, the judgment appealed from is affirmed.

SEEDS and McFIE, JJ., concur. FREEMAN, J., did not hear the argument in this case.

[No. 391. August 24, 1892.]

**MORRIS WOHLGEMUTH, APPELLANT, V. THE
UNITED STATES OF AMERICA, APPELLEES.**

CRIMINAL LAW—PERJURY—INDICTMENT—PROOF—VARIANCE.—On a prosecution, on indictment, for perjury, where the indictment alleged that defendant, in making proof of a preemption claim, falsely swore that he had made “actual settlement” on the land on or about the first day of February, 1886, and that he “had built a house” and “resided on said land continuously until the first day of September, 1886,” and the only evidence offered in support of the indictment was the deposition of defendant, taken to prove up his claim, from which it appeared he had testified that he made settlement on the land “about the first day of February, 1886; and that, in answer to the question, “Has your residence thereon since been continuous?” he testified, “Sometimes I had to make money to improve my place,” and no mention was made of a house in the deposition; to the admission of which testimony defendant objected, on the ground of a variance, which was overruled,—Held: There was a material variance between the allegations and the proof offered to sustain them, and the court below erred in permitting the deposition to go to the jury.

APPEAL, from a judgment convicting defendant of perjury, from the Third Judicial District Court. Judgment reversed.

The facts are stated in the opinion of the court.

E. C. WADE for appellant.

THOMAS SMITH, United States district attorney, for appellees.

McFIE, J.—The defendant was convicted of the crime of perjury at the October term, 1888, of the district court of the Third judicial district, sitting in the county of Dona Ana, and the case is in this court on appeal by the defendant. The perjury alleged to have been committed by defendant was swearing falsely in

making proof upon his preemption claim, number 2671, before the register of the United States land office at Las Cruces, New Mexico, on the first day of September, 1886. The indictment alleges that the defendant Wohlgemuth, testified in his own behalf before said register; that he was duly sworn before a competent officer, and that it became material to show "that the said Morris Wohlgemuth had made actual settlement upon, and had built a house and placed improvements of a certain value upon, and had resided continuously upon, the east half northeast quarter section thirty, and west half northwest quarter section twenty-nine, township fifteen south, range twelve east, from the first day of February to the first day of September, eighteen hundred and eighty-six." The allegation of what the defendant did swear upon that occasion is as follows: "That he, the said Morris Wohlgemuth, made actual settlement on said land, on or about the first day of February, eighteen hundred and eighty-six, and that he had built a house and made ——— dollars' worth of improvements on said land, and that he commenced to reside on said land on the ——— day of February, A. D. 1886, and that he resided on said land continuously until the first day of September, eighteen hundred and eighty-six." Upon the trial the prosecution offered in evidence the testimony of the defendant, taken in the form of question and answer, in the usual form, and upon the blanks used in the land office for that purpose; and from this written testimony of defendant it appears that what he actually did swear was as follows: "Question. When did you first make settlement on the above described land? Answer. About the first day of February, 1886. Question. What was your first act of settlement? Answer. Put in fence posts. Question. When did you first establish an actual residence on said land? Answer. February, 1886. Question.

Has your residence thereon since been continuous? Answer. Sometimes I had to make money to improve my place. Question. What improvements have you made on the land since settling it, and what is the value of the same? Answer. Made ditch, cleaned the land, and put in fence posts."

These questions and answers were all included in the same deposition, upon the same sheet of paper, and constituted all of the testimony of the witness upon the points involved in this case. To the introduction of this deposition of the defendant, as evidence in the case, the defendant by his counsel at the time objected, upon the ground of variance; but the court overruled the objection, and permitted the deposition to go to the jury. To this ruling of the court, the defendant by his counsel at the time excepted, and that is one of the errors assigned for our consideration.

An examination of the allegations of this indictment

PERJURY: indictment: proof: variance.

as to what time the defendant swore, and an examination of the defendant's testimony, which constituted the only proof offered in the case of what the defendant actually did swear, shows a decided variance between the allegations and the proof. Waiving consideration of the important blanks which are to be found in the allegations of this indictment, it will be observed that the indictment alleges that the defendant swore that he had made "actual" settlement on the first day of February, in 1886, while the affidavit shows that the witness swore that he had made "settlement." It may be contended that the word "actual" being added is of no importance, but we are disposed to attach some importance to the word "actual" in this case. The word actual being added to the word "settlement," was calculated to lead the jury to believe that settlement was equivalent to "residence;" but, when used in connection with preemption claims upon land, it does not

necessarily mean "residence." A preemption claimant may make "settlement" upon land by actually establishing a residence thereon, but he may make "settlement" upon the land, within the meaning of the preemption law, without actually residing upon the land. "Settlement," within the meaning of the preemption law, may be made by the erection of a dwelling house, or by the erection of a fence, or many other visible acts of the preemptioner's expression of his intention to appropriate, and such acts as are calculated to give notice to the world that he has appropriated a certain portion of the public domain.

But the indictment further alleges that the defendant swore that he had built a house on said land; but an examination of the testimony shows that the witness did not so swear. On the contrary no mention of a house is to be found in his testimony. Again, the indictment alleges that the defendant swore that he commenced to reside on said land on the—— day of February, A. D. 1886, and that he resided on said land continuously until the first day of September, 1886. The witness did not so testify. The defendant was asked the following question: Has your residence thereon since been continuous? Answer. "Sometimes I had to make money to improve my place." This answer can not be construed to mean what is alleged the defendant swore upon that point. It is only by the merest inference that such a meaning could be induced from it. The witness' answer is either no answer at all, or it is equivalent to saying that he did not reside continuously on the same. Certainly it can not be contended that by that answer he swore to a continuous residence on the land, as is alleged in the indictment. The court permitted this deposition or affidavit to go to the jury, over the objection of counsel, and we think this was error. There was a material variance between the allegations and the proof

offered to sustain them. The testimony of the defendant was reduced to writing at the time he made proof upon his preemption claim, and it was the best evidence of the facts sworn to by him, and no other testimony was offered upon the trial. The testimony that was permitted to go to the jury, as shown by this record, was clearly incompetent; and upon the objection of the defendant, for variance, it should have been excluded, under this indictment.

The rule of pleading on this subject is well settled. The pleader may set out the instrument upon which the perjury is assigned in *haec verba*, or he may set it out in substance; but, if he elect to set out the substance, he must set it out correctly. 2 Bish. Crim. Proc. [3 Ed.], secs. 911, 913; 2 Whart. Crim. Law [9 Ed.], secs. 1129, 1313; U. S. v. Hardyman, 13 Pet. 178.

It is not necessary to consider further the assignments of error in this case inasmuch as the first assignment of error fully justifies a reversal of the judgment of the court below. The judgment will be reversed and the cause remanded to the lower court for further proceedings in accordance with the views herein expressed.

O'BRIEN, C. J., and FREEMAN, SEEDS, and LEE, JJ., concur.

[No. 472. August 24, 1892.]

**SCOTTISH MORTGAGE & LAND INVESTMENT
COMPANY OF NEW MEXICO, LIMITED,
PLAINTIFF IN ERROR, v. W. H. MCBROOM,
DEFENDANT IN ERROR.**

CORPORATIONS, FOREIGN—USURY—LIABILITY FOR ACTS OF RESIDENT AGENT.—An agent of a foreign corporation, loaning money under a contract with the corporation, providing that, "all commissions on loans by the company, and all bonuses or penalties payable by borrowers from them in respect of such loans, shall belong to the company," will be presumed to be acting for the company in receiving commissions on loans in excess of the highest rate of interest allowed by law, where the company has knowledge of each step taken by him in such negotiation, although the agent has received exclusive benefit of the commission (*Fowler v. Equitable Life Ins. Co.*, 12 Sup. Ct. Rep. 1); and the fact that such company was not aware that the transaction was usurious and unlawful, under the law of the territory, will not protect it. *Lloyd v. Scott*, 4 Pet. 105.

ID.—USURY—FORFEITURE.—Where, in such case, an action was brought, under sections 1737, 1738, Compiled Laws, to recover double the amount of the commission or bonus alleged to have been charged and received in excess of the lawful rate of interest prescribed by the statute,—Held: That the better rule is to treat the usurious transaction as valid to the extent of the principal sum and legal interest, and apply all payments made thereon, whether such payments were received as usury, or as a bonus, or commission in reduction of the principal and legal interest; and that such action will not lie until the principal and interest of the loan have been paid.

ERROR, from a judgment for plaintiff, to the Fourth Judicial District Court, San Miguel County. Judgment reversed.

The facts are stated in the opinion of the court.

FISKE & JONES for plaintiff in error.

FRANK SPRINGER for defendant in error.

Under sections 1737, 1738, a right of action accrues against any person, etc., who may charge or collect a

higher rate of interest than twelve per cent per annum, by means of "discount, commission, or any subterfuge." *Lloyd v. Williams*, 3 Wils. 261, followed in *Wade v. Wilson*, 1 East, 195, and reaffirmed in *Wood v. Grimwood*, 10 Barn. & Cress.

If, under the statute, a contract made in violation of the usury law is void, it is conceded that the doctrine of locus penitentiae does not apply. *Tiffany v. Boatman's Institution*, 18 Wall. 384; *Miller v. Ammon*, 145 U. S. 421, and authorities cited.

FREEMAN, J.—This is a writ of error, brought to reverse a judgment rendered in favor of the defendant in error and against the plaintiff in error in the district court for the Fourth judicial district for the county of San Miguel. The facts are substantially as follows: On the twenty-third of June, 1883, the Scottish Mortgage & Land Investment Company of New Mexico, Limited, a corporation organized under the laws of Scotland, filed in the office of the probate clerk of San Miguel county, New Mexico, its certificate of incorporation and articles of association, and a certificate designating Las Vegas as its principal place of business in New Mexico, and George J. Dinkel as its authorized agent, pursuant to the laws of the territory allowing foreign corporations to do business here. By articles of association it appears that the principal object of this company was the investment of money on loan on the security of real, or heritable, or other property in the United States. The directors were empowered to appoint managers and other necessary officers. Previous to filing these papers the company entered into a contract with George J. Dinkel, appointing him and one Browning local managers of the company. Article 4 provided that "all commissions on loans by the company, and all bonuses or penalties payable by borrowers from them in respect of such loans, shall belong to

the company." The general manager of the company was to have general charge of the company's business in New Mexico. On the fifth of February, 1886, the defendant in error made application to the company, through Dinkel, its general manager, for a loan of \$65,000, to be secured by mortgage, and this offer was transmitted to the home office for instruction. The application was at first refused, for the reason that the amount was too large. On July 14 of the same year Dinkel again wrote to Carson & Watson, the general managers at Glasgow, the home office, stating that McBroom had renewed his application for loan, first proposing to pay a commission of \$6,000 for securing the loan, and afterward to give Dinkel a fourth interest in his entire ranch and stock, which interest Dinkel then estimated to be worth \$50,000. In his letter transmitting this offer to the home company Dinkel said: "Now, such a proposition comes only once in a very great while, and I was anxious that the company should receive the benefit of this great commission, which would be in addition to the ten per cent interest he proposed to pay." A directors' meeting was held at the home office to consider this proposition, and it was also declined. On the same day, however, the president of the company wrote Dinkel, giving a full account of the meeting, saying: "In regard to the McBroom business, I very strongly urged on my colleagues that if we could get here the parties whom you have already interested to stand aside, we might give him the whole \$65,000 at twelve per cent, and in that event perhaps McB. might still consider you entitled to a commission," etc. On September 4 Dinkel cabled to the home office that McBroom had backed out; but later on, negotiations having been renewed, Dinkel cabled the home office as follows: "Will directors now loan McBroom \$65,000. First year, six per cent; after

that, ten per cent, with quarter interest." To this telegram the board replied by cable as follows: "McBroom: The board sanction a loan of \$30,000, first mortgage, ten per cent; or \$65,000, twelve per cent. Decline quarter interest, but get best cash bonus possible instead, or get third party to buy quarter interest, and pay us." On the basis of this understanding the trade was consummated, the company advancing in checks, etc., to McBroom, the defendant in error, the sum of \$65,000, and the defendant in error returning at the same time to Dinkel the bonus of \$6,500.

This action was brought under the statute to recover double the amount of this bonus or commission. The action was brought under sections 1737 and 1738 of the Compiled Laws, which are as follows: "Sec. 1737. Any person, persons, or corporation, who shall hereafter charge, collect, or receive from any person a higher rate of interest than twelve per cent per annum, shall be guilty of a misdemeanor, and, upon conviction thereof before the district court or a justice of the peace, shall be fined in a sum of not less than twenty-five dollars, nor more than one hundred dollars; and such person, persons, or corporation, shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators, or assigns, double the amount so collected or received upon any action brought for the recovery of the same within three years after such cause of action accrued. Sec. 1738. The provisions of this act shall also apply to any person, persons, corporation, or officer of the same, who may charge, receive, or collect a higher rate of interest than twelve per cent per annum by means of discount, commission, agency, or any other subterfuge."

The first contention of the plaintiff in error is that the transactions out of which the cause of action arises

were not tainted with usury in a way to affect the rights of the company; that, in order to constitute usury, there must be intention knowingly to contract for usurious interest, and that both parties must participate in this corrupt agreement; that there must be an aggregation of the company. It insists that if there was usury in the transaction it was participated in alone by its agent, Dinkel. The record shows that the \$6,500 claimed to be usurious were paid by defendant in error to Dinkel, the local manager of the company for New Mexico, for his services in procuring the loan. It is insisted, therefore, that the transaction falls within the rule laid down by the supreme court of the United States in the case of *Call v. Palmer*, 116 U. S. 98, wherein that court say: "It is settled that when an agent, who is authorized by his principal to lend money for lawful interest, exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious." In reply to this contention the defendant in error insists: First, that the doctrine of agency has no application to the facts in this case, that Dinkel was not an agent, but an officer of the corporation, that a corporation can act alone through its officers, and that a transaction with Dinkel was a transaction with the corporation itself; and, second, that the corporation knowingly participated in the usurious transaction by authorizing Dinkel, its local manager, to get "the best cash bonus possible," and that it can not protect itself from the consequences of its corrupt transaction by showing that it allowed its local manager to retain the fruit thereof. In the view that we have taken of the matter, it is immaterial to determine whether Dinkel was an agent, or whether, as an officer, he was a part of the corporation, so that a transaction with him was a transaction with the cor-

FOREIGN corporations: usury: liability for acts of resident agent.

poration itself; for the fourth article of the agreement between him and the home office, as already shown, provided that all such commissions and bonuses should inure to the benefit of the company. In view of this provision of his contract, and of the fact that the company had knowledge of each step taken by him, it is to be presumed that he was acting for the company. The facts in this case bring it clearly within the rule laid down by the supreme court of the United States in the case of *Fowler v. Equitable Life Insurance Trust Company*, 14 U. S. 384, 12 Sup. Ct. Rep. 1, wherein a foreign corporation (whose agent in the state accepted a commission from the borrower on loans procured from such foreign corporation) was held to have received the proceeds of the usurious transaction, the commission paid to the agent being in excess of the highest rate of interest allowed by law. Now, does it afford any protection to the company to show that it was ignorant of the law of this territory, and was not therefore aware that the transaction was usurious and unlawful? *Lloyd v. Scott*, 4 Pet. 105.

Conceding, therefore, the correctness of the position of the defendant in error that the transaction was with the plaintiff in error, we are next to inquire into the legal effect of the contract as it relates to rights and liabilities of the contracting parties. The contention of the plaintiff in error is that, while a party may be indicted under section 1737 as for a misdemeanor for charging an illegal rate of interest, in order to subject him to the penalty of a forfeiture he must have received it, the forfeiture being fixed at "double the amount so collected or received."

It insists also that "the amount so received" has reference only to the amount in excess of the legal rate; that is, the usury. It insists also that, as the \$6,500 received by it or its agent were taken out of the loan made by it to defend-

USURY: forfeiture.

ant in error, it was not such a collecting or receiving as entitles defendant in error to maintain this action; that if A. and B. enter into a contract, by the terms of which it is agreed that A. shall lend to B. \$1,000, in consideration of which B. shall pay to A. a bonus of \$100, and execute to him his note for \$1,000, bearing the legal rate of interest; and in pursuance of the contract A. lends to B. the \$1,000, and B. hands back to A. \$100, and his note for \$1,000, that the practical effect to the transaction is that B. goes off with \$900 of A.'s money, while A. retains B.'s note for \$1,000; and that the legal effect of the transaction is that the usury is contained in the note, and that A. has not received usurious interest for the money actually advanced. To the contrary is the position of the defendant in error, who insists that the penalty or forfeiture accrued when the usurious interest was charged and the amount of the forfeiture was fixed by the retention of the \$6,500 out of the sum advanced by the plaintiff in error. But few, if any, questions growing out of the law governing contracts have given rise to more discussion and resulted in less satisfactory adjudication than those involving the subject of usury. This contrariety of adjudication is the fruit of two opposing theories entertained as to the moral, as contradistinguished from the legal, character of usurious transactions; the theory of one class of jurists and legislators being that the exaction of usury is an iniquity, and that, therefore, all laws passed for the suppression thereof should receive a liberal construction; while, on the contrary, it is insisted that while it is the province of the legislature to fix the rate of interest that may be contracted for and to make usurious contracts void, such contracts are not within themselves in contravention of good morals, are not mala in se, and that, therefore, the penalties imposed should be confined to the strict letter of the statute.

Guided by the first of these opposing theories, many courts, both in this country and England, have held that not only is the exaction of usury unlawful, but that it avoids every contract into which it enters; while other courts of equal weight and respectability have holden to the doctrine that no greater penalty should be imposed than is strictly within the words of the statute. It has been variously held that a statute which prohibits under penalty the exaction of more than the prescribed rate of interest makes the contract for the excess void, makes the contract for the entire interest void, makes the entire contract itself void.

We shall proceed now to inquire as to the construction heretofore given to statutes similar to that of ours, and particularly as to the time at which the cause of action accrued, for this is the principal question presented for our determination. In order to arrive at any satisfactory solution of this question, it becomes necessary to trace minutely the history of legislation and judicial construction as applied to this question. Anciently, at the common law, any premium taken for the use of money was an offense. Such a premium was denominated "usury," no such term as "interest" being known to the law. By the statute of 111 Henry VII and 111 Henry IV, all usury is damned and prohibited as being against the law of God and the laws of the realm and the law of nature. 3 Inst. 152. The statute of 37 Henry VIII, chapter 9, although entitled "An act against usury," was the first English statute that undertook to make usury in a limited degree lawful. This statute was repealed by 5 and 6 Edward VI, but was reenacted by 13 Elizabeth, chapter 8. Various enactments followed until the year 1713, when an act very similar in terms to our own made all bonds and assurances of title void whereupon there should be reserved or taken more than ten per cent per annum; and also gave a right of action for treble the

value of the money lent against the lender if he should receive or take more than five per cent per annum. A case involving the construction of this statute came before the court of common pleas, and is reported in 3 Wilson, at page 259. The question arose upon the statute which limited the right of action to one year from and after the commission of the offense. In that case, as in this, the usurious interest was retained by the lender out of the amount advanced on the loan; that is, was paid out of the borrowed money, and a note executed for the entire amount. The note was afterward paid. The action to recover the penalty was brought more than one year after the loan, but less than a year after the payment of the note. It was held that the offense was complete when the usurious interest was reserved or taken out of the money loaned, the lord chief justice observing: "To constitute the offense for which the present action [an action of debt under the statute] is brought to recover treble the value of the money lent, these three things must concur: First, a contract between the parties; second, moneys or other things lent; third, above five per cent per annum received by the lender for the forbearance. And whenever these three matters concur, then the offense is committed. No time is mentioned with respect to payment of the principal money lent. The principal money may never be paid, and yet the offense be committed." The doctrine of this case was subsequently approved in the case of *Wade v. Wilson*, 1 East, 199. The same doctrine has been announced at different times by quite a number of our state courts of last resort. *Kirkpatrick v. Houston*, 4 Watts & S. 115; *Grow v. Albee*, 19 Vt. 543; *Nelson v. Cooley*, 20 Vt. 204; *Com. v. Frost*, 5 Mass. 53; *Seawell v. Shomberger*, 2 Murph. L. & E. (N. C.), 200. These and many other cases that might be cited to the same effect hold that, within the meaning of the statute

which defines the offense and limits the time within which an action may be brought to recover the penalty, the right of action accrues whenever any money is reserved or received by the lender which is intended at the time of such reservation or reception to be applied in the satisfaction of the usury. This construction cuts off entirely the *locus penitentiae*, and taints the transaction in its very inception. The reason for this construction is thus stated by the supreme court of Pennsylvania in the case of *Kirkpatrick v. Houston*, *supra*, as follows: "Any other interpretation of the act would put it in the power of the lender to stamp the character of guilt or innocence on it at the precise point of time convenient for him to elude the prosecution by means of the limitation attached to it. Should the borrower sue at the receipt of the first payment, he might be told that he was too soon; should he wait until the whole was paid, he might be told that the offense had been committed long before, and that the year had gone by." In this case, however, the learned chief justice (GIBSON) uses a single expression that, in our opinion, militates strongly against the doctrine contained in the quotation just given, and furnishes excellent grounds for reaching a different conclusion. He says: "I will not say that the defendant might not lawfully receive pro tanto payment specially in discharge of what was lawfully due, for it is the corruption of taking and not the corruption of the contract, which constituted the offense to which the penalty is annexed." The doctrine of this case, therefore, fixes the liability of the lender absolutely by the receipt of any part of the usury as such, and henceforth there is for him no *locus penitentiae*.

The same construction which gives a right of action under the statute just as soon as any portion of the usurious interest has been received, without

regard to whether any portion of the sum advanced has been returned, as a rule treats such contracts void as to the whole transaction. It is therefore insisted with much zeal and ability by the counsel for the defendant in error that there was no legal portion of the debt to which this usurious interest could be applied, and that, therefore, the doctrine of a *locus penitentiae* has no application; that, the legislature having provided a penalty for the exaction of usury, any contract which embraces usury is void; that no right of action can arise out of a transaction which constitutes within itself a misdemeanor; that "there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is itself illegal;" thus invoking the application of the maxim "*ex turpi contractu non oritur actio.*" This proposition might be accepted as elementary were it not for the difficulties announced at the threshold of this opinion, arising out of the real nature of a usurious transaction. Is the exaction of usury to be regarded at this time, and under existing legislation, as such an offense as to invoke the application of this maxim, with all of its attendant disabilities? It sheds much light on the subject to note the fact that the tendency of more modern legislation and judicial determination of this question has been in the direction of mitigating the rigor of the common law rule that treated all transactions tainted with usury as void, and which also treated any exaction of usurious interest as an offense against as well the moral senses and the laws of God as against those of the realm. The supreme court of Pennsylvania, which in 1842 decided the case of *Kirkpatrick v. Houston*, 4 Watts & S., *supra*, wherein it was held that "the receipt of money on account of a usurious contract is a consummation of the offense, from the consequences of which the party can not relieve himself by subsequent release of the

excess which was usurious," having a similar question before it in 1889, held as follows: "The ruling complained of in the first specification of error was justified by the case of *Brown v. Bank*, 72 Pa. St. 209, where it was held that it is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury, and from which the limitation of the action for the penalty commences to run. If this were not so, and the usury is complete by merely including it in a renewal note, the penalty might be recovered without the payment of either principal or interest." *Kearney v. First National Bank*, 18 Atl. Rep. 598. So, also, in the state of Massachusetts we have already seen the doctrine held in the case of *Com. v. Frost* (decided in 1809), that the offense of usury is complete if more than the legal interest is paid at the time of the loan whether the principal sum is ever refunded or not; and yet it has since been held by the same court that there can be no recovery of usury until the principal and legal interest have been paid; that, up to the receipt of the last payment, the lender has his *locus penitentiae*. *Stevens v. Lincoln*, 7 Metc. 525; *Saunders v. Lambert*, 7 Gray, 484. So, also, the doctrine laid down in the case of *Nelson v. Cooley*, 20 Vt. 204, *supra* (decided at the February term, 1847), is in effect overruled by the same court in the case of *Harvey v. Nat. Life Insurance Company* (decided at the May term, 1888). 14 Atl. Rep. 7. So, also, there has been by the English courts a marked modification of the doctrine; for while, as we have seen that the rule laid down in the reign of George III in the *Loyd v. Williams* case, became the leading authority for that construction, both in England and in this country, the same court has since that time, in the case of *Scrugg v. Freeman*, 2 Bos. & P. 381 (decided April 23, 1801), held that in a transaction wherein £500 were handed to the borrower,

and by him £50 were handed back to the lender, there was, in contemplation of law, a loan of but £450.

We think that the better rule is to treat the usurious transaction (or rather, the transaction claimed to be tainted with usury) as valid to the extent of the principal sum and the legal interest, and to treat all payments made thereon, whether received as usury or as a bonus or commission, *eo nomine* as a reduction of the legal interest and principal.

This doctrine seems to have the support of the following authorities: *Kendall v. Crouch*, 88 Ky. 199, 11 S. W. Rep. 587, cited in *Neale v. Rouse*, 19 S. W. Rep. (Ky.) 171. So, also, in the case of *Kearney v. Bank of Clarion* (Sup. Ct. Pa., tried October 18, 1889), reported in 18 Atl. Rep. 598, the court cites with approval the case of *Brown v. Bank*, 72 Pa. St. 209, already referred to. The supreme court of Nebraska, in the case of *Hall v. First National Bank*, reported page 150, 46 N. W. Rep., holds to the same doctrine, declaring that it would be a reproach upon the law to apply payments so made to the discharge of a usurious interest, and at the same time exact as a penalty the forfeiture of double the amount. In the case of *Harvey v. National Life Insurance Co.* (Sup. Ct. Vt.), reported at page 7, 14 Atl. Rep., it was held that where, on the receipt of a note of \$1,000 and interest, the lender counted out \$1,000 in money and then took therefrom \$100, being the usury agreed upon, the statute of limitations does not begin to run against an action to recover the usury, until the note is fully paid. This doctrine, we think, is in accord with the decisions of the supreme court of the United States, rendered in the construction of a statute so nearly resembling our own as to make the decisions of that court instructive, if not conclusive. What is known as the "National Banking Act" (R. S., sec. 5193), or so much as is necessary to quote, is as follows: "The taking, receiving,

reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided, such action is commenced within two years from the time the usurious transaction occurred."

While the phraseology differs, the two statutes provide for substantially the same thing,—the recovery of usurious interest within a given time "after such cause of action accrued" (the New Mexico statute), or, "from the time the usurious transaction occurred" (the national statute). The construction given to this latter statute is that the limitation runs from the date of the last payment. *Duncan v. First National Bank, Mt. Pleasant*, 1 Nat. Bank Cas. 362, 72 Pa. St. 209; *Kearney v. First National Bank*, 18 Atl. Rep. (Pa. Sup. Ct.) 598; 14 Atl. Rep. 8, 9. And, indeed, upon reason as well as upon authority, we think this is the proper construction, if we are to give effect to the contract out of which the usurious transaction grows. If the contract is valid to the extent of the principal and legal interest, there seems to be no sound reason why the borrower should be allowed to recover as a penalty twice the amount of the usury, while he is still indebted to the lender the entire amount of the principal and legal interest. We have given careful attention to the argument pressed upon our consideration with so much zeal and ability, and supported by so many authorities of great respectability, in support of the doctrine that this contract, being usurious, was therefore void. It is now well settled, however, that the reserva-

tion of usurious interest does not render a contract void, unless the statute prohibiting the usury in express terms declares such contract to be void. In the case of *Farmers National Bank v. Dearing*, 91 U. S. 35, Mr. Justice SWAYNE, delivering the opinion of court, said: "Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void as to the excess. *Burnhisel v. Firman*, assignee, 22 Wall. 170; *German v. Calvert*, 12 Serg. & R. 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall v. Vicksburg*, 15 Wall. 156. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Vatt. 20th Rule of Construction. Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford v. Ingersol*, 3 Hill, 38; *First National Bank of Whitehall v. Lamb*, 57 Barb. 429." And again, in construing the national bank act, the same court, speaking through Mr. Justice HARLAN, in the case of *Oates v. National Bank*, 100 U. S. 249, says: "The statute under which the bank was organized, known as the 'National Banking Act' does not declare the contract under which the usurious interest is paid to be void. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred, as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. On what principle could this court add another to the penalties declared by the law itself?

De Wolf v. Johnson, 10 Wheat. 367; Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29; Barnet v. National Bank, 98 U. S. 555." If it should be insisted that this contract ought to be declared void for the reason that its execution was made a misdemeanor by the statute, in which particular it differs from the national bank act, which does not make the act a misdemeanor, but simply declares a forfeiture, we reply that our construction is nevertheless within the rule laid down by the supreme court in the case just quoted. It is true that the statute makes such a transaction a misdemeanor, but the same statute prescribes the punishment, to wit, a fine of not less than \$25 nor more than \$100, and the forfeiture of double the amount of such interest so collected or received. If the legislature had intended to forfeit the entire debt, or to render the transaction void, nothing would have been easier than to have so declared. The instructions of the learned judge who tried this cause in the court below were given in strict accord with the theory of the leading English case (which, as we have seen, has been adopted by some of our state courts), and was a clear and correct exposition of the law from that standpoint. And while we admit that there is some conflict of authorities on the points mainly controverted, we are nevertheless of the opinion that the judgment was erroneous, and that the cause must be remanded, with directions to the court below to proceed in accordance with the views herein announced.

SEEDS, LEE, and McFIE, JJ., concur.

[No. 510. August 24, 1892.]

JOSE INEZ TRUJILLO, PLAINTIFF IN ERROR, v.
TERRITORY OF NEW MEXICO, DEFENDANT
IN ERROR.

CRIMINAL LAW—EXCLUSION OF WITNESSES FROM COURT ROOM—ADMISSION OF TESTIMONY AT CLOSE OF EXAMINATION.—In a prosecution for assault with intent to kill, where, at the opening of the case, the witnesses were sworn and put under the rule of exclusion from the court room, the defendant, at the close of the testimony, called and offered to examine witnesses who had not been subpoenaed, sworn, or placed under the rule, without showing that such testimony was material, or without giving any reason for not complying with the order of the court placing witnesses under the rule, the court properly refused to permit the examination of such witnesses.

ERROR, from a judgment convicting defendant of an assault with intent to kill, to the Fourth Judicial District Court, Mora County. Judgment affirmed.

The facts are stated in the opinion of the court.

E. W. PIERCE for plaintiff in error.

LEWIS C. FORT, district attorney, for defendant in error.

The principle is well settled that the judge may, at his discretion, on the application of either party, order a separation of ordinary witnesses in order that they may be prevented from hearing the testimony of the witnesses as given in the court room. Rogers, *Expert Testimony*, p. 90; Greenlf. Ev., sec. 432.

Where the court orders a separation of witnesses, and a party retains one of the witnesses in the house, who hears the testimony of the others, the court may refuse to hear his evidence. *Jackson v. State*, 14 Ind.

327; Bishop on Crim. Proc., sec. 1088. The case of Davis v. Byrd, 94 Ind., has no application here. That decision was based upon a different state of facts.

The enforcement of the rule to exclude witnesses, being a matter in the discretion of the trial court, its action thereon will not be reviewed on appeal, unless an abuse of discretion is shown. Shield v. State, 8 Tex. App. 427; Powell v. State, 13 Id. 244; People v. O'Laughlin, 1 W. C. Rep. 164; Harvey v. State, 68 Ga. 612.

Where a witness has not been subpoenaed and no diligence used to secure his attendance, it is within the discretion of the trial court to refuse to allow him to testify after the case is closed but before it is submitted to the jury. State v. Smith, 80 Mo. 516. See, also, Attorney General v. Bulpit, 9 Price, 4; Thomas v. Davis, 7 C. & P. 350; Parker v. McWilliams, 6 Bingham, 683; Cooley's Case, Moo. & Malk. 329; State v. Sparrow, 2 Murph. 487; Wyld's Case, C. & P. 380.

Evidence of character in behalf of the defendant charged with crime is only material in doubtful cases. 1 Archibald's Crim. Prac., p. 400, and cases there cited. See, also, Burrill on Circumstantial Ev. 531; Territory v. Gay, 2 Dak. Ter. 125.

FREEMAN, J.—The accused was indicted at the November term, 1891, of the district court for the county of San Miguel for an assault with intent to kill. The venue was afterward changed to the county of Mora, where, at the March term, 1892, he was put upon his trial and convicted. A single error is assigned, which is this: On application of the territory when the case was called the witnesses were sworn and put under the rule. At the close of the testimony the defendant called and offered to examine five witnesses who had not theretofore been subpoenaed, sworn, or put under the rule. He stated that his sole purpose in call-

ing these witnesses was to examine them as to his character. The territory objected, and the objection was sustained. The accused did not, either at the time he offered these witnesses, nor in his motion for new trial, pretend that they would testify to his good character. Nor is any reason given why they were not sworn at the proper time and placed under the rule. Nor does he pretend that he was surprised by the evidence adduced against him, or that anything intervened during the trial that made this character of evidence important or material. No surprise is suggested, and no reason is offered for not having complied with the rule of the court excluding witnesses. If, therefore, he was entitled as a matter of legal right to examine these witnesses, it follows as a corollary that a defendant in a criminal trial has the right to refuse to obey the order of the court placing his witnesses under the rule. If he had shown, by affidavit or otherwise, that he had not purposely refused to call these witnesses; or that they were absent when these other witnesses were sworn; or that the materiality of their testimony was not discovered until it was too late to put them under the rule, he would have afforded us an opportunity to hold that he was prejudiced by their exclusion. But nothing of this character appears in the record, nor is it claimed on argument here. Nor is this all; for while we are not called upon to assume that the defendant purposely kept these witnesses present in the court room within hearing of the testimony, in order that they might collusively assist in the defense, there is nothing in the record that in the least repels that assumption, or that gives the least color to the good faith of the accused. On the contrary, he stands upon his legal right to defy the order of the court excluding the witnesses, and to make it error on the part of the trial judge to refuse to allow him to examine witnesses kept in the court room in disobe-

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witnesses: ad-
mission of testi-
mony at close of
examination.

dience of the rule. We think a statement of this proposition carries with it its own answer.

We deem it unnecessary to discuss the two questions raised in the argument: First, as to whether evidence of character is material except in doubtful cases; and, second, whether it is within the discretion of the court to exclude the testimony of a witness who has violated the rule by remaining in the court room during the examination of the witnesses. As to the first proposition the rule seems now to be well settled that the character of the accused touching the nature of the offense with which he stands charged, may, on his motion be put in evidence without regard to the weight of evidence against him. He may introduce evidence of character, not alone for the purpose of turning the scale under doubtful circumstances, but for the purpose of creating the doubt, and as to the second proposition, the better rule seems to be that while the trial judge has the discretion to refuse to allow such witness to be examined, and that on satisfactory proof that such witness had been purposely retained in the court room in violation of the rule, he should refuse such permission, yet, if it should appear that the witness had violated the rule without the knowledge or procurement of the accused, it would be the duty of the court to allow him to be examined, "subject to observation as to his conduct in disobeying the order." 1 Thomp. Trials, sec. 276. Ordinarily, witnesses who are summoned as experts, and those called as to the character of another witness, are excepted from the operation of the rule. *Brown v. State*, 3 Tex. App. 295. Attorneys in the cause who are called as witnesses are excepted from the rule for the obvious reason that their presence in the court is necessary. But it is nowhere held, so far as we are advised, that, in the absence of a statute, it is not within the discretion of the court to subject witnesses as to character, and

experts, to the requirements of the rule; and, indeed, the learned author of Thompson on Trials says that it is the better exercise of discretion to put such witnesses (experts) under the rule, section 278. In many of the states the rule of exclusion may be invoked as a matter of right. *Rainwater v. Elmore*, 1 Heisk. (Tenn.) 363; *Nelson v. State*, 2 Swan. (Tenn.) 237; *Smith v. State*, 4 Lea (Tenn.), 428; *Johnson v. State*, 14 Ga. 55; *State v. Tellers*, 7 N. J. Law, 220. But, as already observed, the record in this case does not require us to pass upon this question. We simply hold that when, on the opening of a trial either in a civil or criminal case, the parties are required by the order of the court to have their witnesses called and placed under the rule, it is not error for the trial judge to refuse to permit the examination of a witness who has not been put under the rule, in the absence of any offer to show either: First, any reason or excuse for not having complied with the order of the court placing the witness under the rule; or, second, the materiality of the testimony, which in this case consists in showing that the witnesses, if allowed to do so, would testify to the good character of the accused. The appellant having failed to comply with either of these requirements, the action of the trial judge in sustaining the objection to the introduction of the excluded witnesses was not erroneous. The judgment of the court is therefore affirmed.

SEEDS, McFIE, and LEE, JJ., concur.

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[No. 513. August 24, 1892.]

**TERRITORY OF NEW MEXICO, APPELLANT, V.
PEDRO CARRERA, APPELLEE.**

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF INDICTMENT.—In a prosecution, on indictment, for assault with intent to commit murder, the indictment must state the manner and means of the assault so far, at least, as to show that the crime would have been murder had not the acts involved in the facts pleaded stopped short of their full effect.

APPEAL, from a judgment for defendant sustaining a motion to quash an indictment for assault with intent to kill, from the Third Judicial District Court, Dona Ana County. Affirmed.

The case is stated in the opinion of the court.

S. B. NEWCOMB and EDWARD L. BARTLETT, solicitor general, for appellant.

SEEDS, J.—This was a criminal prosecution, wherein the defendant was indicted for an assault with intent to commit murder. He moved to quash the indictment upon the grounds that it was indefinite and uncertain, and because it did not set forth whether the alleged assault was committed by means of poison, or by the use of a deadly weapon, or some hard instrument; nor did it set forth the manner in which said assault was committed. The court quashed the indictment, and from that decision the territory appeals.

The material portion of the indictment is as follows: "That Pedro Carrera, * * * with force and arms, * * * with malice aforethought, and unlawfully, feloniously, deliberately, willfully, and premeditatedly, did make an assault with

intent then and there and thereby him, the said * * *, to kill and murder, against the form of the statute," etc. It may be premised that it is not now

ASSAULT with intent to kill: sufficiency of indictment.

necessary to charge the commission of a crime with that fullness and particularity of verbiage which was essential under the strict rules of the old common law. At the same time the rebound from the often technical absurdities of that magnificent system is not so pronounced as to be equally absurd in the laxity by which the facts may be set out. The essential averments of facts, as distinct from legal conclusions, must be set out with such exactness as to fully apprise the defendant of what crime he is charged. In an indictment for an assault with intent to commit murder such allegations of facts should be made as would show, at least generally, that the crime would have been murder if the acts involved in the pleaded facts had not stopped short of their full effect. 1 Whar. Crim. Law, sec. 641. At common law the indictment is sufficient if the use of a deadly weapon be averred, and the intent be specifically stated. 1 Whar. Crim. Law, sec. 644. This clearly implies that the means or instrument of committing the assault should be stated. We are aware that some states hold that it is not necessary to state the instrument or means employed in an indictment for an assault with intent to commit murder. *Martin v. State*, 40 Tex. 19; *Bittick v. State*, Id. 117; *State v. Seamons*, 1 Iowa, 418; *Harrison v. State*, 2 Cold. 232. But in those states they seem to have parted company entirely from the common law. We have not done so here, as by statute, section 1823, it is made the rule of decision and practice, where not specifically changed. We think the judgment of the lower court was correct, and it will be affirmed.

FREEMAN, O'BRIEN, and LEE, JJ., concur.

[No. 519. August 24, 1892.]

**TERRITORY OF NEW MEXICO, APPELLEE, V.
JESSE R. HICKS, APPELLANT.**

CRIMINAL LAW—MURDER—APPEAL, MOTION TO DISMISS.—On a motion to dismiss an appeal from a conviction of murder, on the grounds that the appellant had failed to file a transcript of the record in the cause within ten days before the first day of the term of the court to which it was returnable, though appellant filed the record with the clerk on the first day of the term; and that it was a common law action, and should have been brought by writ of error,—Held: In cases where the appeal does not operate as a stay of proceedings, the transcript is not made out and forwarded to the appellate court unless on the application of the appellant. But in cases, as in the case at bar, where the appeal does operate as a stay of the proceedings, it is the duty of the district clerk, under section 2476, Compiled Laws, without any application on the part of appellant, to file with the clerk of the supreme court a transcript of the record without delay; and his failure to do so will not subject the appellant to a dismissal of his appeal. Neither section 2189, Compiled Laws, nor the act of 1891, in relation to appeals in equity cases and writs of error in common law cases, has any application to appeals in criminal cases.

ID.—VENUE, PROOF OF.—It is not necessary in a trial for murder that the venue be affirmatively proven, it is sufficient if the evidence incidentally given in connection with the facts in the case shows that the venue was properly laid, as in this case, where it appears from the evidence that the person alleged to have been murdered died in the county where the venue was laid. Comp. Laws, sec. 2460; State v. Dent, 3 Am. Crim. Rep. 421.

ID.—MOTION FOR NEW TRIAL, REQUISITES OF—EXCEPTIONS—WAIVER.—A new trial will not be granted, in such case, on the ground that the interpretation of the testimony and the argument of the counsel were incorrect, and prejudicial to defendant, and that at the time no exception was taken, because neither the defendant nor his counsel were aware of such incorrect interpretation, where the motion fails to set out the exact words of the witness and counsel, and the exact words used by the interpreter in interpreting them in the language in which they were so interpreted, so that the court below, or the appellate court, may pass intelligently upon the question to determine whether such interpretation was erroneous or not. In such case an objection is not sufficient; an exception must be taken; and a failure to except is a waiver of the objection.

ID.—MOTION IN ARREST OF JUDGMENT—SPECIAL TERM.—In view of section 552a, Compiled Laws, providing that, “when, in the discretion of the judge of any district court, a furtherance of justice may require it, a special term of the district court may be called,” etc., and section 553, Compiled Laws, providing that, “Any special term of the district court that may be ordered under the provisions of this act shall be held for the purpose of hearing all causes that may be depending in said court, both civil and criminal,” etc., a motion in arrest of judgment, on the ground that the term of the court at which the defendant was tried and convicted was a special term, and unauthorized by law, and the proceedings of the term *coram non judice*, will not be sustained.

ID.—CONFLICT OF TESTIMONY.—On appeal in a cause the appellate court will not weigh the evidence where there is a direct conflict.

APPEAL, from a judgment convicting defendant of murder in the third degree, from the Third Judicial District Court, Dona Ana County. Judgment affirmed.

The facts are stated in the opinion of the court.

A. B. FALL for appellant.

The court erred in overruling defendant’s motion for instruction to the jury to return a verdict in his behalf. *State v. Turpey*, 59 Cal. 371; 51 Id. 319; *Whar. Crim. Ev.* 107.

As to setting aside a verdict, see *United States v. Daubner*, 17 Fed. Rep. 807.

The interpretation of the testimony in this case, together with the interpretation of the argument of counsel, was incorrect and prejudicial to defendant’s case. *Whar. Crim. Ev.* 449, and cases cited; *U. S. v. Garber*, 2 Sum. 19; *Schiner v. People*, 23 Ill. 17.

Defendant’s motion in arrest of judgment raises not only special but general jurisdictional questions, and rights are affected which could not be waived in any case, particularly in one of this character. 25 *Pac. Rep.* 294; *Wyoming Territory v. Price*, 1 *Wy.* 168; *Spencer v. Com. of Va.*, 12 *S. E. Rep.* 10, 979.

If the legislature can delegate to a judge the authority to call a special term, as attempted to be done by sections 552, 553, Compiled Laws, 1884, it can delegate to the same judge the power to fix both time and place for each of its regular terms; and yet by the organic act and subsequent acts, the power is given to the legislature alone to fix the time and place of holding court in the different counties. *Winters v. Hughes*, 25 Pac. Rep. (Utah) 759; *Loeb v. Matthews*, 37 Ind.; *Cooley's Const. Lim.* 139-155.

If the sections of the laws referred to *supra*, and under which this call was made are unconstitutional or in conflict with the organic act and subsequent acts of congress, then all the acts of this so-called special term of court in Dona Ana county were coram non judice, in fact an absolute nullity. *Smith v. Rice*, 11 Mass.; 3 Vermont, 114; 9 Cal. 173; *Freem. on Judgments*, 121.

If the legislature had power to enact laws providing for a special term of court, then this court has only special powers, as conferred by statutes, and must, in all its proceedings be governed by the statutes, as would a court of special or limited jurisdiction, and no presumption as to the regularity of its proceedings will be entertained. *Freem. on Judgments*, 123; 18 Wall. 350; 54 Tex. 154; *Cooley's Const. Lim.* 407; 55 Cal. 212; 5 Mass. 434; 10 Wend. 590; 20 Pac. Rep. 842; 8 Ore. 317; *Suth. Stat. Con.*, secs. 391, 454. See, also, *Suth. Stat. Con.*, sec. 121, pp. 448, 449; *Kelly v. State*, 34 Ohio St. 239; 5 Mass. 434; 2 Yeates, 493; 9 Harris, 147; *Buck v. State*, 38 Ohio St. 664; 11 S. E. Rep. 665; 1 Neb. 397; 3 Fed. Rep. 283; *Thompson & Merriam on Juries*, 79; *Suth. Stat. Con.*, secs. 391, 394, 395, 454.

If, according to the decision of the court below, section 23 of the laws of 1891 was unconstitutional, section 555, Compiled Laws, not having been followed

in the selection of the jury, the term being a special term, necessitating the strict observance of statutory requirements to obtain jurisdiction and render its acts legal,—the twelve men acting as a jury were not a jury, the court without jurisdiction, the verdict a nullity, and the sentence without authority of law. *Cox v. People*, 19 Hun (N. Y.), 430; 80 N. Y. 500; *State v. Judges Third City Court*, 2 So. Rep. 786; 49 N. W. Rep. 174; 92 Ill. 187; 100 U. S. 339.

As to following statutes in drawing juries see 3 Vt. 114; 80 Va. 551; *State v. Jones*, 97 N. C. 469; *Wyers v. State*, 2 S. W. Rep. 722; 81 Pa. St. 349; 63 N. Y. 36; *Loeb v. Matthews*, 37 Ind. See, also, *State v. Deslonde*, 27 La. Ann. 71; *Cockey v. Cole*, 28 Md.; 62 Mo. 585.

When the expression “term of court” is used in a statute, a regular, not a special, term is always meant. *Thompkins v. Clackamas Co.*, 4 Pac. Rep. 1210.

EDWARD L. BARTLETT, solicitor general, for appellee.

The proof of place where Martin died was all that was necessary. This was in accordance with the statute governing such cases. Sec. 2460, Comp. Laws, 1884, p. 1146; *State v. Dent*, 3 Am. Crim. Rep., p. 421.

The special term at which defendant was tried was a legal term. Organic Act, p. 63, Comp. Laws, sec. 1874; *Id.*, secs. 552, 552a, 553. See, also, Organic Act, sec. 1865, Comp. Laws, p. 62; Organic Act, sec. 1915, Comp. Laws, p. 71.

The proviso in section 23 of the Act of February 26, 1891, is invalid, and void. It must be strictly construed, and takes no case out of the enacting clause which does not fall fully within its terms. *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Intoxicating Liquor Cases*,

25 Kan. 524; U. S. v. Dickson, 15 Pet. (U. S.) 141-165; Epps v. Epps, 17 Ill. App. 196; Suth. on Stat. Con., sec. 223, pp. 297 and 298.

The present jury law of 1891 was prepared in view of the decision of this court in *Territory v. Luciano Baca et al.*, at the present term, construing the jury law of 1889, and holding it to be special legislation and void under the act of congress of July 30, 1886. See *McCarthy v. Commonwealth*, 2 Atlantic Rep. (Pa.) 423; *State v. Inhabitants of Bloomfield*, 2 Atlantic Rep. (N. J.) 249; *State ex rel. Randolph v. Wood*, 7 Id. 286, and cases cited.

Judgment can only be arrested for such errors as are apparent on the face of the record, or for some matter which ought to appear of record but does not. 12 Am. & Eng. Encyclopedia of Law, p. 147b, and cases cited; 1 Bish. Crim. Proc., sec. 1282.

As to what constitutes the "record," see: U. S. v. Barnhart, 17 Fed. Rep. 581; *Warren v. Flagg*, 2 Pick. (Mass.) 448; Bouv. Law Dict., title "Record," Black's Law Dict., title "Record;" 1 Bish. Crim. Proc., secs. 1341-1347.

The writ of error only reaches errors apparent on the face of the record, not extending to preliminary steps. 1 Bish. Crim. Proc., sec. 1368.

"The supreme court shall examine the record, and on the facts therein contained, alone, shall award a new trial, reverse or affirm the judgment." Comp. Laws, sec. 2190; Laws, 1889, pp. 3, 4.

Objections to the drawing and impaneling of a trial jury can not for the first time be raised on a motion for a new trial. *People v. Coffman*, 24 Cal. 230-235.

Any matter in abatement, or defect in summoning or impaneling the grand or petit jury can not be reached by motion in arrest. *Stone v. People*, 2 Scam. (Ill.) 326; *Hanley v. State*, 6 Ohio, 399; *Veatch v. State*, 56 Ind. 584; 1 Bish. Crim. Proc., sec. 1285.

“If the defendant pleads he admits the jurisdiction.” The objection to the jurisdiction must be first raised in the court below or it can not be considered in this court, unless the want of power to hear and determine is clearly apparent upon the record. *Winters v. Hughes*, 24 Pac. Rep. 760; *Candill v. Tharp*, 1 G. Green, 95; *Starr v. Wilson*, 1 Morris (Iowa), 577.

OPINION ON MOTION TO DISMISS.

LEE, J.—This cause is first presented to us on motion to dismiss. The territory, by E. L. Bartlett, solicitor general, produces the record in this cause, and moves the court to dismiss the appeal from the judgment of the court below, upon the grounds that said appellant has failed to file a transcript of the record and proceedings in this cause within ten days before the first day of the present term of this court, though appellant filed said record with the clerk on the first day of the term; that it is a common law action, and should have been brought into this court by a writ of error. Section 2469 of the Compiled Laws provides that in all cases of final judgment rendered upon an indictment an appeal to the supreme court shall be allowed if appealed from during the term at which said indictment was rendered. Section 2476 provides that when an appeal shall be taken which operates as a stay of proceedings it shall be the duty of the clerk of the district court to make out a transcript of the record of the cause, and to certify and return the same to the office of the clerk of the supreme court without delay. Section 2477 provides that when an appeal does not operate as a stay of proceedings, such transcript shall be made out, ratified, and returned on application of the appellant. It will be noticed that when an appeal operates as a stay of proceedings it becomes the duty of the clerk of the district court without delay to make

MURDER: appeal,
motion to dis-
miss.

out the transcript, and forward the same to the clerk of the supreme court. In cases where the appeal does not operate as a stay of proceedings the transcript is not made out and forwarded to the supreme court unless an application for the same is made by the appellant. This case being one where the appeal operates as a stay of proceedings, it was the duty of the district clerk, without any application or motion on the part of the appellant, to send a transcript of the record, as it appeared in his office, to the clerk of the supreme court; and his failure to do so in the ten days before the commencement of the term of the supreme court to which it would be returnable should not visit upon the appellant the consequence of a dismissal of his appeal. This view is fully sustained under statutes substantially the same as ours, and in the case of *State v. Pratt*, 20 Iowa, 268, that court held that, though the appellant failed to file the transcript, the state might file the same, and it would be the duty of the supreme court to examine the record, and upon it to render such judgment as the law might demand; the defendant in that state, as here, not being required to assign or join in error. Section 2189 of the Compiled Laws was not intended to, and does not, apply to appeals in criminal cases; nor does the act of the legislature of 1891, in regard to appeals in equity cases and writs of error in common law cases, have any application to appeals in criminal cases. The motion to dismiss the appeal will be overruled.

OPINION ON THE MERITS.

The record shows that the defendant, Jesse R. Hicks, together with one A. Green Hicks, his son, was indicted for the murder of one Edward Martin, in the district court in and for the county of Dona Ana, at a special term of said court, held in said county during

the month of May, 1892. A severance having been granted, the defendant was put upon trial under said indictment, convicted of murder in the third degree, and sentenced to imprisonment in the penitentiary for a period of seven years. After the evidence was fully heard, the defendant, by his counsel, moved the court to instruct the jury to find a verdict for the defendant, upon the ground that the venue had not been proven, which motion was overruled by the court. The ruling of the court in this particular is assigned as one of the errors. It is not necessary that the venue be affirm-

atively proven, if evidence was incidentally given in connection with the facts in the case sufficient to show that the venue was properly laid. The record shows that Edward Martin, the person alleged to have been killed, died at the house of David McDonald, in the county of Dona Ana, in the territory of New Mexico. Under the provisions of the statute it is sufficient to establish the venue to prove that the person charged to have been murdered died in the county where the venue is laid. Comp. Laws, N. M., sec. 2460; State v. Dent, 3 Am. Crim. R. 421. In his motion for a new trial the defendant sets up, as one of the grounds for granting the same, that the interpretation of the testimony in the case, as well as

MOTION for new trial, requisites of: exceptions: waiver.

the interpretation of the argument of the counsel for the defendant, was in many points incorrect, and prejudicial to defendant's case, and that at the time no exception was taken, for the reason that neither the defendant nor his counsel was aware of such wrongful and incorrect interpretation. The rule that the rulings on the trial not effectually questioned by specific objections are waived, is one of very wide scope. It is not sufficient to object; the objection must be supplemented by an exception. The failure to except is a waiver of the

objection. Nor is it always sufficient to object and except, for, as a general rule, an opportunity for review must be given to the trial court by the appropriate motion. A general rule, as declared in many cases, is that a breach of duty on the part of an officer of the court is not available as error for the reversal of a judgment, unless it was of such a character as to authorize the inference or presumption that it injured the complaining party; and this would have to be made to appear in the motion by specific allegations. Where objection is made that words testified to by a witness, or used by counsel in argument to a jury in one language, have been wrongfully and incorrectly interpreted in another language, so as to convey a wrong and erroneous meaning thereto, it would be necessary for the party charging the misinterpretation to set out the exact words as testified by the witness or used by the counsel in the language in which they were so used, and the exact words used by the interpreter in interpreting them in the language in which they were so interpreted, so that the court below, or the appellate court, might intelligently pass upon the question to determine whether or not such interpretation was erroneous; and, if so, whether it was to the prejudice of the defendant. General objections would not be sufficient. In this case there were no exceptions taken setting up the words charged to have been erroneously interpreted, the reason given being that the defendant and his counsel were ignorant of such erroneous interpretation at the time; but, if that were deemed sufficient to excuse the exception, it would be no reason that the words should not be set out in the motion for a new trial, if they expected the court to pass upon them; and, not setting them out, the court very properly overruled the motion.

A question is raised by counsel for the defendant in a motion for arrest of judgment, that, as the term of

the court at which the defendant was tried and convicted was a special term, it was unauthorized by law, and the proceedings of the term were coram non judice. In support of this position it is contended that an act establishing the courts for the territory of New Mexico, passed in 1850, provided that a district court shall be held in each district of the territory by one of the justices of the supreme court, at such time and place as may be prescribed by law, and limited the courts of the territory to such terms as the time for holding had been fixed by the legislature. But, even if this were correct, in 1858 an act of congress was passed, which provides "that the judges of the supreme court of each territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party; but the expense of holding such courts shall be paid by the territory, or by the counties in which the courts are held, and the United States shall in no case be chargeable therewith." Rev. Stat., sec. 1874. And section 1915 of the organic act, approved August 16, 1856, authorizes the judges of the supreme court in the territories of New Mexico and Arizona to fix and appoint the several times and places of holding the courts in their respective districts. If the former act of 1850 was intended to limit the time of holding the terms of the district court to regular terms established by the legislature, such was clearly changed by the subsequent acts of congress, authorizing the judges to fix the time of holding courts, but which would be inoperative were it not for the act of the legislature which provided the means by which the courts were enabled to hold such terms. The construction given by the supreme court of the United States in the case

MOTION in arrest
of judgment:
special term.

of *Hornbuckle v. Toombs*, 18 Wall. 648, of the powers of the territorial legislature under the organic act, is about as that exercised by a state legislature. The court, in that opinion, says: "Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions of supplying all details of legislation necessary to put the system into operation, even to defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively coextensive with, and correspondent to, that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction." In the exercise of this power the legislature of the territory of New Mexico has made provisions for special terms of court, among which is the following: "The respective district judges are hereby authorized, at any time, to hold special terms of the district court in any county of their judicial districts when a term thereof in said county may have failed; provided, said special term shall not conflict with a term of said district court in any other county in the same judicial district; said terms to be called in the same manner now provided by law for the holding of special terms of the district courts in this territory."

Comp. Laws, sec. 552. "When, in the discretion of the judge of any district court, a furtherance of justice may require it, a special term of the district court may be called in the same manner now provided by law for calling special terms; and any business at the time pending in said court, or that may come up before it in the usual course of business of the court, may be taken up and acted upon and disposed of in the same manner as at a regular term of said court." Comp. Laws, sec. 552a. "Any special term of the district court that may be ordered under the provisions of this act shall be held for the purpose of hearing all causes that may be depending in said court, both civil and criminal, and may continue in session the same length of time that is allotted to the regular term of court for such county, and no longer." Comp. Laws, sec. 553. Other necessary provisions to give legal force and effect to such special terms are also provided by statutes of the territory, and we can see no reason why terms so held should not be of like legal effect with those where the time of holding has been fixed by statute.

It is contended, also, that if we should hold legal that term of court at which the conviction of the defendant took place, yet the trial was void for the reason that the jury thereof was not impaneled in accordance with the provisions of the statute. This question involves the construction of sections 23, 24, and 25 of the jury act of 1891, which is entitled, "An act to define the qualifications and regulate the drawing of jurors, approved February 26, 1891." Section 23 is as follows: "In the district court for each county in the territory, when, in the opinion of the judge thereof, it shall be necessary to summon juries, the grand jury shall have twenty-one members, of whom the concurrence of not less than twelve shall be necessary to the finding of any indictment; and the panel of the petit jurors shall consist of twenty-four members. The

qualifications and manner of selecting and drawing such jurors shall be as provided by the law of 1887, chapter 51, but they shall be selected and drawn from the body of the county for which the court is held: provided, that this section shall not apply after August 1, 1891, except for special terms of court." Section 24 makes the same provisions for jurors drawn to try cases on the United States side of the court, and each section contains the following limitation: "Provided, that this section shall not apply after August 1, 1891, except for special terms." But neither section provides in what contingency the exception shall operate, but we find it in section 25, which reads as follows: "At any term of any district court of either class, if jurors have not been selected for said term as required by this act, it shall be the duty of the court forthwith to proceed to the selection and summoning of such jurors in such manner as provided by the law of 1887 to meet such contingencies: provided, that this section shall not apply after August 1, 1891, except for special terms." Therefore, by the plain and positive terms of this act, after August 1, 1891, the only contingency in which a jury is authorized by the act to be drawn as provided by chapter 51 of the law of 1887 is at a special term, either of the United States or territorial court, where jurors have not been selected for said term as required by the present act of 1891. The legal status of a jury thus drawn it is not necessary for us to determine in this case, as the jury at this term, though a special term, had been previously drawn in accordance with the requirements of the act of 1891. When the terms of the statute are plain and positive, they require no construction by the court. The court will simply follow the letter of the statute, but, if a construction is necessary, it is the duty of the court to construe the statute so as to give it an effect. It is also the duty of the court to give it such a construc-

tion as would make it harmonious in all its parts, if that can be done. In the view that we have taken of the act, full force and effect is given to every section, and each part is harmonious with the whole, which condition would be reversed if we were to construe the statute as contended by the counsel for the defendant. But, even if we were to adopt the construction contended for by the counsel for the defendant, it would be unavailing to him, as it has been held by the supreme court of the United States that by pleading not guilty to an indictment, and going to trial without objection to the jury, as was done in this case, any objection is waived, although it may be based on the constitutionality of the law under which the jury was selected. *U. S. v. Gale*, 109 U. S. 65.

In regard to the contention that the verdict is not sustained by the weight of the evidence, it has been held in a very great number of cases that an appellate tribunal will not weigh the evidence in a case where there is a direct conflict, but will accept and act upon that which the court and jury trying the case deemed most trustworthy. The cases in which a judgment has been reversed upon the ground that the verdict is not sustained by the evidence are rare. Many appellate courts refuse to consider such a case at all, the theory being that the court and jury who saw the witnesses and heard them testify were in a better position to determine the weight that should be given to their evidence than are the judges of the appellate court, who have simply the notes of the evidence taken upon the trial. The wisdom of the Roman rule that witnesses are to be weighed, and not counted, has peculiar application to this case. The witnesses for the prosecution testified to the effect that the defendant shot the deceased, Martin. One of the witnesses, Mary A. McDonald, testified that she saw the

CONFLICT of
testimony.

defendant raise the gun, point it toward the deceased, heard the report, saw Martin fall, heard him cry out. That she ran to him. When she got to him, Martin said: "Mother, pick me up. Take me to the house. Old man Hicks has shot me." That when the shot was fired she saw old man Hicks standing near a rock wall. A. Green Hicks was at one side of him, and a one-eyed man on the other side. That she knew A. Green Hicks as well as she knew anybody. On the part of the defense, A. Green Hicks, a son of the defendant, and jointly indicted with him for the murder of Martin, testified that he shot and killed the deceased, Martin, and in this he is corroborated by other witnesses on the part of the defense, viz., the man who was there present, and other members of the Hicks family, whereby arose a direct conflict in the testimony adduced on the trial, which it was the particular province of the jury to determine. When a person confesses or admits that he committed a crime, it is often entitled to considerable weight as being an admission against his interest; but this presumption may be overcome by showing that the witness had a strong motive to testify as he did, though not in accordance with the truth. The jury should take into consideration all the facts and circumstances in the case and they may have thought that A. Green Hicks testified that he shot and killed the deceased, in the manner and under the circumstances stated in his testimony to save his aged father from the awful consequences of the crime for which he was being tried. In any event, it was for the jury to determine whom they would believe and whom they would disbelieve; and where the jury has passed upon the testimony in a fair and impartial trial, this court will not disturb the verdict. Finding no error in the record which would authorize an interference by this court, the judgment of the court below will be affirmed.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ.,
concur.

[No. 428. August 24, 1892.]

**NEW MEXICAN RAILROAD COMPANY, PLAINTIFF
IN ERROR, v. GEORGE B. HENDRICKS
ET AL., DEFENDANTS IN ERROR.**

DAMAGES, RAILROAD COMPANY—CONSTRUCTION OF ROAD ON STREET—ABUTTING PROPERTY.—The owner of property abutting on a street or highway, which has been diverted from its original purpose, by the construction of a railroad along the street or highway, is not deprived of the right to compensation, where such diversion entails a hardship upon such owner not common to the general public.

ID.—APPRAISEMENT—SECTION 2667, COMPILED LAWS.—Such occupation of a street or highway is not such a taking as would authorize a proceeding under section 2667, Compiled Laws, providing the mode of ascertaining the damages inflicted by the taking of "land, water, timber," etc., by a railroad.

ID.—ASSESSMENT OF—EVIDENCE—RULE.—In determining the damages, in such case, under the issue as to the value of the abutting property, it was error to permit the witnesses to state their opinion as to the amount of damages inflicted on plaintiff by the construction of the road. The rule of damages in such cases is the value of the property immediately before and after the construction of the road, and the examination of the witnesses should be confined to such facts and circumstances as go to determine the value of the property, and the nature of the injury, from which the jury may draw its own conclusions.

ID.—ADMISSION OF INCOMPETENT EVIDENCE, HARMLESS ERROR, WHEN.—In an action for damages, in such case, when it appears from the facts presented to the jury that the verdict is fully sustained by competent evidence, and that the amount of the verdict could not be reduced on a new trial, the erroneous admission of incompetent testimony, placing the damages at an amount largely in excess of that found by the jury, is no cause for reversal, where the defendant has not been prejudiced thereby, and it appears that, upon the whole case, substantial justice has been done.

ERROR, from a judgment in favor of plaintiffs, to the Fourth Judicial District Court, San Miguel County. Judgment affirmed; O'BRIEN, C. J., and SEEDS, J., dissenting, on the ground it did not appear the verdict could not be reduced on a new trial.

The facts are stated in the opinion of the court.

FRANK SPRINGER for plaintiff in error.

A. A. JONES for defendant in error.

FREEMAN, J.—Error to district court, San Miguel county. This was an action brought by defendants in error to recover of plaintiff in error damages inflicted by the latter upon the former in the construction of a railroad upon a street or highway upon which the residence of the defendants in error was situated. There was a verdict and judgment for the defendants in error. The right of the defendants in error to recover is resisted in part on the ground that, as the company were authorized by statute (Comp. Laws, sec. 2665, subsec. 5) to construct their line of road along any "street, avenue, or highway," no right of action accrued to defendants in error, unless it could be shown that the plaintiff in error had abused the right thus conferred by building or operating its road in such a careless and negligent manner as to inflict upon the owner of abutting property unnecessary damage. It

DAMAGES: construction of railroad on street; abutting property.

seems to us, however, to be well settled that the most the state can do is to surrender its own right to the public street or highway; and that it can not impair or surrender the property represented by the easement of private owners of abutting property in the right of way to and from their homes. While the public, as such, may consent that a highway may be diverted from its original purpose, yet if such diversion entails a hardship upon the owner of abutting property which is not common to the general public, such owner is entitled to compensation. *Lahr v. Railway Co.*, 104 N. Y. 268, cited in 30 Am. & Eng. R. R. Cases, 415; *Drucker v. Manhattan R'y Co.*, 12 N. E. Rep. (N. Y. App.) 570. ✓

It is further insisted by the plaintiff in error that if the defendants in error had any right of action it was statutory and exclusive in its character; that they should have proceeded under section 2667 of the Compiled Laws to procure an appraisal of the property taken. We can not assent to this contention. The statute in question provides in detail the mode of ascertaining the damages inflicted by the taking of "land, water, timber, stone, gravel, or other material." An easement in the public highway was not in the contemplation of the legislature in the enactment of this section. The propriety of this construction becomes apparent when we come to consider that section 2665, which provides for the occupation of streams, streets, etc., and section 2667, which provides the mode of adjusting the amount of compensation for the use of land, water, timber, etc., taken from the "owner or claimant thereof," are parts of the same legislation; the former being chapter 6, section 2, and the latter chapter 7, section 1, of the act approved February 2, 1878. The former concession is burdened alone with the duty on the part of the company to restore such "stream, * * * street," etc., * * * "to the former state, as near as may be, so as not unnecessarily to impair their use or injure their franchise," while in the latter the company is required to compensate "the owner or claimant." The occupation of a street or highway is not, therefore, such a taking as authorizes a proceeding under the statute.

We are of the opinion, however, that there was error in the admission of testimony that went to fix the amount of damages. The witnesses were permitted to state what in their opinion constituted the amount of damages inflicted upon the defendants in error. The rule of damages in such cases is the value of the property immediately

APPRAISEMENT:
section 2667,
Compiled Laws.

ASSESSMENT of
damages: evi-
dence: rule.

before and after the construction of the road. It is true that the same witness may testify as to both the prior and succeeding valuation, and thus, in effect, give his opinion as to the extent of the damage. Nevertheless it is a safer and sounder rule to confine the examination of the witness to the facts and circumstances which go to make up the value of the property, and the character of the injury, from which the jury may draw its own inference. Common experience demonstrates the case with which a willing witness may give his estimate of the extent of supposed damages, and the difficulty he may encounter when called upon to give facts upon which he predicates his opinion. *Railroad Co. v. Campbell*, 4 Ohio St. 595; *Railway Co. v. Ball*, 5 Ohio St. 573, cited in *Railway Co. v. Gardner*, 5 Ohio, cited in 30 Am. & Eng. R. R. Cases, 416.

It was competent for the defendants in error to show that immediately before the construction of the road their property was worth a given amount, and that immediately after such construction it was worth only a given amount, being less than the former value; and then to show such substantial injury to that property, by the building and operation of the road, as would warrant the jury in concluding that the reduction in valuation and consequent damage was the natural result of the construction of the road, and that it was not such a damage as was shared in by the public at large. Such acts of substantial injury as will support a recovery may consist in throwing up of an embankment which shuts off the owner of the damaged property from the highway, the casting of cinders and ashes upon the house, or the injection of smoke and noxious vapors into the dwelling, the jarring of the walls or foundations so as to impair the stability of the improvements, etc. The defendant would be entitled to meet the case thus made by the plaintiffs by showing that the premises were worth less before, and more after,

the building of the road than the amount claimed by the plaintiffs, or that causes other than the damage inflicted by the building of the road had intervened to depreciate the value of the property. Evidence to satisfy a jury on questions of this character should be gathered from facts and circumstances existing within the knowledge of the witness called to testify. It sheds no light upon the issue, therefore, to allow a witness to state that in his opinion the premises of the defendant were damaged to a given extent by the construction of the road. On the contrary, such testimony is calculated to mislead the jury.

Having determined that incompetent evidence was allow to go to the jury, we are next to inquire as to whether this was such an error as makes it necessary for this court to reverse and remand the cause. That the error was what is ordinarily denominated a "reversible error" is, we think, clear. That is to say, it is such an error of law as would warrant this court in reversing the judgment and remanding the cause. And it may be safely affirmed as a general proposition that where incompetent evidence of a character calculated to influence their minds has been allowed to go to the jury, and a verdict has been returned in favor of the party in whose interest the incompetent evidence was admitted, it is the better and safer practice to reverse the judgment and remand the cause. In view, however, of section 2190 of the Compiled Laws, and of the fourth section of the act of January 5, 1889, we think we are authorized to look to the record for the purpose of determining whether, upon the consideration of the whole case, substantial justice has been done. We do not mean to hold that the statutes in question were intended to confer on this court the functions of a jury. This is not a court of original jurisdiction, and is clothed with no power to ascertain the facts in any

ADMISSION of
incompetent
evidence, harm-
less error, when.

case, except as provided by the rules of the common law, as modified by these statutes. At the common law, but two methods were known by which a question of fact determined by a jury could be reexamined: First, by new trial awarded by the trial judge; or, second, by the award of a venire facias de novo, by the appellate court, for some error of law which had intervened. 18 Wall. 249. In this cause we have already seen that an error of law did intervene in the admission of incompetent evidence, but, under the authority conferred on us by statutes already referred to, we have been able to examine the whole record, and have thus satisfied ourselves that the errors complained of did not prejudice the plaintiff in error.

We examined the record, so far as it discloses the rulings of the court, for the purpose of ascertaining if any error of law has intervened; for, while this court is authorized and required to examine the entire record, it is not required to sit as a jury to determine the weight of the evidence. When, therefore, it appears that incompetent evidence has gone to the jury, it becomes the duty of this court to examine the whole record, including, of course, all of the evidence, for the purpose of ascertaining whether, notwithstanding the admission of improper evidence, it does not appear that the verdict of the jury is supported by competent evidence or that in their findings the jury have discarded such incompetent evidence, and have based their findings exclusively on evidence properly received. When, therefore, we examine the facts as presented to the jury, and find that the verdict is amply supported by competent evidence, and that in amount or in character such verdict clearly indicates that it was based on the competent rather than incompetent testimony, and that upon the whole case substantial justice has been done, we think it is our duty to affirm the judgment. Hill, New Trials, 147, and cases cited.

Applying this doctrine to the case before us, the record shows that of the four witnesses who were improperly allowed to state what, in their opinion, was a fair estimate of the amount of damages, not one of them placed it at less than \$1,000, one of them placing it at \$2,000, and another at \$2,500. It clearly appears that defendants in error were damaged by the construction of the road, and were entitled to recover in this action. The jury allowed them \$450, and it is impossible for us to see, in view of our construction of the law, how this amount could be materially reduced on rehearing. We think that, excluding all the immaterial and incompetent evidence, there still remains sufficient in the record to support this verdict, and that no substantial good could result by reversing the cause, and remanding it for new trial. We are therefore of the opinion that the judgment should be affirmed, and it is so ordered. ✓

LEE and McFIE, JJ., concur.

O'BRIEN, C. J.—I dissent as to the disposition to be made of the case, while assenting to the result reached in every other respect. The case should be remanded for new trial in the court below, as I do not think that it satisfactorily appears from the record that a second jury, on competent evidence, would find the present verdict.

SEEDS, J.—I concur with the chief justice, in that this case ought to be sent back for another trial, as there are errors in the admission of certain evidence which might have influenced the size of the verdict. The plaintiff in error is entitled to a trial in which such evidence is not before the jury.

[No. 474. August 24, 1892.]

DEMETRIO PEREZ, TERRITORIAL AUDITOR, APPELLANT, v. TERRITORY OF NEW MEXICO EX REL. WILLIAM H. WHITEMAN, APPELLEE.

DISTRICT ATTORNEYS, PAYMENT OF FEES OF—ACT FEBRUARY 26, 1891—CONSTRUCTION OF STATUTES.—Held: That clause of the finance bill of February 26, 1891, appropriating \$7,000, for the "salary fund of district attorneys," includes the fees as well as salaries of such attorneys, and when there is a balance in the territorial treasury, sufficient for the purpose, it is subject to the payment of such fees.

APPEAL, from an order directing a peremptory writ of mandamus to issue to compel the territorial auditor to audit a claim for district attorneys' fees and draw his warrant upon the treasurer for the payment of the same, from the Second Judicial District Court, Bernalillo County. Judgment affirmed.

The opinion states the facts.

EDWARD L. BARTLETT, solicitor general, for the territory.

McFIE, J.—On the eleventh day of May, 1891, the territory, on the relation of William H. Whiteman, filed in the office of the clerk of the Second judicial district, county of Bernalillo, and territory of New Mexico, a petition for a writ of mandamus, alleging, in substance, that said Whiteman had been appointed and duly confirmed as district attorney of the counties of Bernalillo and Valencia, in said district, and in the discharge of his duties as such there was due him the sum of \$230; for fees earned in the prosecution and defense of criminal cases in said district, as provided by law; that he had made a demand upon the auditor

for a warrant for the amount, but that said auditor refused to draw a warrant for the amount upon the treasury, and that he still refuses to audit said account and draw said warrant, upon the ground that there is no appropriation made by the legislative assembly to pay fees of district attorneys. The petition further alleges that the legislative assembly of the territory of New Mexico, at its twenty-ninth session, passed an act to provide funds and making appropriations for the forty-second and forty-third fiscal years, and for other purposes, approved February 26, 1891, and that by said act made an appropriation of \$7,000 for the payment of district attorneys for the forty-second fiscal year, and the same amount for the forty-third fiscal year. The petitioner further represented that there are eight district attorneys in said territory; that they are entitled by law to receive \$500 per annum each as salary; and that the payment of such amounts to each of said district attorneys would make an amount of \$4,000, leaving a balance of \$3,000 in the territorial treasury, to the credit of the fund provided for district attorneys; and from this fund the petitioner seeks to compel the respondent to audit his account and draw his warrant upon the treasurer, as auditor of said territory, for the payment of the amount due petitioner. Upon this petition the court ordered the alternative writ of mandamus to issue, directing the respondent as such auditor to audit said account and draw said warrant, or show cause why he did not do so. The respondent declined to audit said account and draw said warrant in response to said writ, and on the eighteenth day of May filed an answer to the same in the nature of showing cause why he did not comply with the writ. The respondent in his answer admits that said Whiteman was district attorney as alleged; that the services were rendered, and that the amount claimed therefor was a proper and legitimate charge under the law, against the territory of New Mexico;

admits the presentation to him of a verified account, and his refusal to audit the same, and draw his warrant on the territorial treasurer for the amount; and places his refusal upon the ground that there was no money available for the payment thereof, and that he was therefore prohibited by law from drawing such warrant, under section 10, chapter 95, Laws, 1891, which is as follows: "Sec. 10. If the auditor of the territory shall draw any warrant on the treasurer of the territory or if the treasurer of the territory shall pay any warrant when there is no money in the treasury in the particular fund for which the warrant is drawn, he shall be liable to a fine of not less than one thousand dollars (\$1,000) and imprisonment for not less than one year, and shall be summarily removed from office by the governor." Respondent further admits that there was an appropriation for the forty-second fiscal year of the sum of \$7,000, included in the finance bill, and designated therein as "salary fund for district attorneys." It is further admitted that the total amount of salary due the several district attorneys for the forty-second fiscal year, would be \$4,000, leaving a balance of \$3,000, which would be covered into the treasury for the redemption of outstanding warrants, at the close of the fiscal year. The respondent further says in his answer that the said funds provided for in the finance bill were to be raised by specific levies of taxation; that said levies had been made; and further says "that such specific levies were by said law apportioned among ten separate and distinct funds therein provided, among which there were none for the fees of the district attorneys." Appended to the answer of the respondent is the following certificate of the territorial treasurer:

"I, Rufus J. Palen, territorial treasurer of the territory of New Mexico, do hereby certify that the balance on hand of the entire salary fund of the territorial funds of said territory on the 16th day of May, A. D.

1891, is ten thousand, six hundred and four and 35-100 dollars. Witness my hand and seal this 16th day of May, A. D. 1891.

RUFUS J. PALEN,

“Treasurer.”

To the answer of the respondent, petitioner filed a demurrer, in which the special causes of demurrer are set up as follows: First. That the twenty-ninth legislative assembly of the territory of New Mexico, in an act approved February 26, 1891, appropriated the sum of \$7,000 for the payment of salaries and fees of the district attorneys for the forty-third fiscal year, out of the salary fund. Second. That the appropriation of \$7,000 for the payment of salaries and fees of district attorneys for the forty-third fiscal year was the appropriation of money actually in the territorial treasury at the date of said act, and was derived from taxes paid into said treasury during the forty-second fiscal year. The court sustained the demurrer to the answer, and awarded the peremptory writ of mandamus against the respondent. From these pleadings it is clear that the question to be determined is whether the relator was entitled to have his account audited and warrant drawn by the auditor for the amount demanded by him, as fees of district attorneys. The respondent refused to audit the account or issue the warrant, upon the ground that there was no appropriation for the “fees of district attorneys,” although admitting that there were \$3,000 in the fund set apart in the finance bill for salaries of district attorneys, and admitting that it was probably the intention of the legislature that the overplus of said fund should be applied in payment of the fees of district attorneys.

We are therefore required to declare the proper construction of that clause of the finance bill appropriating \$7,000 for the “salary fund of district attorneys.” On the part of the relator the contention is that the term is broad enough to include both salary and the fees of

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of district attor-
neys: construc-
tion of statutes.

district attorneys to the extent of the fund provided for district attorneys, that is, that the term should be construed as being equivalent to "compensation for district attorneys," including both salary and fees; while on the part of the respondent the contention is that nothing but the salaries provided by law, excluding fees, are included in the terms. We believe that this clause in the finance bill should be liberally construed. It could not have been the intention of the legislature to appropriate the sum of \$7,000 specifically for district attorneys, and make that appropriation in such a manner that only \$4,000 of that sum could be paid to them. It is admitted by the respondent that the \$3,000 remaining in the fund, after the statutory salaries were paid out of it, would be covered into the treasury, as a general fund for the redemption of outstanding warrants at the close of the fiscal year by operation of law. This shows very clearly that the legislature did not intend by the said act to appropriate \$7,000 for district attorneys, and then deprive them of \$3,000 of the amount. We think the legislature intended, by the terms used in the finance bill, that the entire amount of \$7,000 should be paid to the district attorneys for the compensation due them, either for statutory salary, or for fees, and that, if such compensation did not amount to the full sum appropriated, the balance should be covered into the treasury. The language used in the finance bill is susceptible of such a construction, and is consistent with the evident intention of the legislature. By thus construing this act, it is clear that the relator was entitled to have the account audited, and a warrant drawn upon the treasury for the amount; and the statement of the treasurer shows that there were funds in the hands of the treasurer at the time the answer of the respondent was filed. In view of the law prohibiting the auditor from auditing accounts and drawing his warrant where there are no

funds in the treasury to pay them, and in view of the question raised by the answer of the respondent, which was dependent upon a construction of the statute as to whether or not there were funds in the treasury upon which he could properly draw his warrant in favor of the relator, we can but commend the course of the respondent in refusing to issue the warrant as commanded by the alternative writ, prior to a judicial determination of his right to draw upon this fund. Still, we think the court properly awarded the peremptory writ, and that there was no error in the court's action in doing so. The record shows that the respondent immediately complied with the commands of the peremptory writ, and issued the warrant to the relator. The appeal in this case did not operate as a supersedeas, and hence the money has doubtless been paid. The forty-second fiscal year having expired, and all surplus funds having been covered into the treasury, there seems to remain only a question of costs. The judgment of the court below will therefore be affirmed, at the costs of the respondent.

O'BRIEN, C. J., and SEEDS and FREEMAN, JJ.,
concur.

[No. 475. August 24, 1892.]

WILLIAM GARLAND, PLAINTIFF IN ERROR, V.
SPERLING BROTHERS, DEFENDANTS
IN ERROR.

GARNISHMENT—MORTGAGEE IN POSSESSION WITH OPTION TO PURCHASE.—

Where a creditor, in pursuance of a written contract between himself and his debtors, defining their respective rights and obligations, took possession of the property of the debtors, as mortgagee in possession after condition broken, with the conceded right to purchase the same for a certain sum less the amount of the mortgage debt, interest, and expenses, on or before a certain date, the debtors obligating themselves to sell and convey to him the property on said terms, provided they had not previously paid to him the full amount of the debt due

him—Held: The contract fixed the relations of the parties, as mortgagor and mortgagee, and until there was a change of those relations, by a foreclosure of the mortgage and purchase of the premises at a sale, in case of a failure or refusal of the debtors to pay the debt or convey the property as agreed, the creditor could not become a vendee in possession, legally liable for the whole or any part of the purchase price of the premises, so as to render him subject to be charged in a garnishee proceeding under section 2159, Compiled Laws, 1884. By this section it is essential that the debt be in existence at the time of the service of the garnishment process, owing and payable at the present time or some future time, absolutely and unconditionally.

ERROR, from a judgment in favor of plaintiffs, to the Fifth Judicial District Court, Socorro County. Judgment reversed.

The facts are stated in the opinion of the court.

WARREN, FERGUSON & BRUNER for plaintiff in error.

Garnishment upon execution is authorized by the statute, only when the prescribed efforts to find property of the execution defendant have failed. Section 2159, Compiled Laws, 1884.

A garnishee can not, like a defendant, cure any irregularity by appearance, or waive any requirement necessary to give jurisdiction. 2 Wade on Attachment, secs. 336–361.

The court should have sustained the garnishee's motion to postpone the hearing. Waples on Attachment, p. 489; 2 Wade on Attachment, sec. 501.

In garnishment proceedings, if the plaintiff, in his denial of the garnishee's answer, tenders an issue upon a particular state of facts, the proofs will be limited to such issue, and the plaintiff can recover upon no other ground. Freeze v. Cooperative C. Co., 67 Iowa, 24, 42 N. W. Rep. 583; Britt v. Bradshaw, 18 Ark. 530; Twelve v. Lodano, 15 Ala. 732–734; Atkins v. Watson, 12 Tex. 199; Fowler v. Williamson, 52 Ala. 16; Kelly v. Weymouth, 68 Me. 197.

Only legal, as distinguished from equitable, rights, are subject to garnishment. A mortgagee in possession is not liable as garnishee, unless it be for excess of value of the property. Waples on Attach., pp. 204, 348; Dieter v. Smith, 70 Ill. 168; Jones on Chattel Mortgages, p. 557; 2 Wade on Attach., secs. 329, 333, 348; Drake on Attach., p. 539, and cases cited; Webster v. Steele, 75 Ill. 544; Teague v. Le Grand, 7 Am. Rep. 64; Williams v. Young, 46 Iowa, 140; Caldwell v. Coates, 78 Pa. St. 312; Nesbit v. Ware, 30 Ala. 68; Curtis v. Alvord, 45 Conn. 569; Waples on Attach., p. 197.

Neither equity nor law will compel a vendee to take a defective title; and the vendor must show ability and offer to convey good title. Thompson v. Carpenter, 45 Am. Dec. 681; Rawle on Cov. 430, et seq.; Dwight v. Cutler, 64 Am. Dec. 110; Greenwood v. Ligon, 48 Id. 776; Sudgen on Vendors [7 Am. Ed.], 701; Feemster v. May, 53 Am. Dec. 84, and note; Gano v. Renshaw, 44 Id. 152, and note, 156.

The attaching creditor can acquire no greater rights against the garnishee than the defendant had; and the garnishee's rights under preexisting contracts remain unaffected by the garnishment. Drake on Attach. 245, 454, 457, 458, 519. Waples on Attach. 195-197; Wade on Attach. 440-444; Frem. on Executions, secs. 416, 417; 1 Jones on Mortgages, sec. 711; 8 Eng. and Am. Encyclopedia of Law, 1147, 1189; 1 Id. 914; Mathis v. Clark, 12 Am. Dec. 688; Webb v. Miller, 47 Id. 190, and note.

WILLIAM B. CHILDERS for defendants in error.

O'BRIEN, C. J.—On the twenty-fifth of May, 1888, in the district court for Socorro county, in an action at law wherein the defendants in error were plaintiffs and the Shorthorn Cattle Company was defendant, the plaintiffs recovered judgment against the defendant company

for the sum of \$2,646.98, besides the costs of suit. In aid of the execution issued upon this judgment, garnishee summons was served upon William Garland. The sheriff made due service of the writ upon the garnishee, but he did not, however, certify in his return that he had demanded payment of the judgment debtor, or that he had requested said debtor to show him sufficient property to satisfy the same; nor did he state therein that he was unable to find sufficient property to discharge said judgment. At the return term of the writ of garnishment, the plaintiffs filed interrogatories as to whether at or after the service of garnishment summons upon him he had in his possession any land, tenements, goods, chattels, moneys, choses in action, credits, or effects of the defendant company, and also whether he was at such time or since in any manner indebted to the defendant. The garnishee answered that he was in possession of certain property belonging to the defendant as pledgee or bailee to secure a mortgage indebtedness, and that the same was insufficient to satisfy such indebtedness. He further denied that he was indebted to defendant in any sum whatever. Plaintiffs, in reply to said answer, denied all the allegations thereof, and specifically alleged that, in pursuance of a written contract, entered into between him and the judgment debtor, the garnishee had agreed that he would, on or before nine months after the first day of November, 1887, to wit, on the first day of August, 1888, purchase a large amount of property, consisting of cattle, horses, ranch property, live stock, and real estate, particularly described in the said contract, for the sum of \$100,000, and agreed to take possession of said property, and keep and maintain the same, and pay all the expenses for the care and management thereof, from the first day of November, 1887. Plaintiffs further allege that on the twenty-seventh day of August, 1888, the defendant company, in pursuance of

the contract, sold and conveyed to said garnishee all of said property, and a large amount of other property belonging to said cattle company, for the sum of \$100,000; that the greater part of said purchase money was paid to the defendant company by the release of certain trust deeds upon the property described in said contract, but that the sum of \$10,000 was withheld by the said garnishee, and had not been paid, and then remained due from said garnishee to the defendant as part of the purchase price of said property; and prayed judgment against the garnishee. The case was tried to a jury upon these interrogatories, answers, denials, and allegations. The garnishment summons was served July 17, 1888. On the fourth day of August, 1888, after the service of the garnishment summons, the parties entered into a new contract, varying the terms of the contract of October 20, 1887, as to the price to be paid for the property. In pursuance of the contract so modified, the parties of the first part made and delivered to Garland a deed of conveyance, dated August 27, 1888, of the premises aforesaid, as the same were described in certain trust deeds.

When the case was called for trial, the garnishee, among other things, moved the court to discharge him, for the reason that the summons in garnishment had been illegally issued and served, which motion was denied. Plaintiffs then read in evidence the deposition of R. J. Bishop. They then offered in evidence the contract hereinbefore referred to, dated October 20, 1887, and the three deeds of trust therein described. He then introduced a deed of conveyance dated August 27, 1888, conveying all of said mortgaged property, and releasing the equity of redemption therein, to said Garland. He then called as a witness William B. Childers, Esq., who testified to a conversation had with garnishee a short time before August 1, 1888, wherein Garland, on the assumption that the cattle company

complied with its contract of October 20, 1887, admitted that he would owe the company something over \$4,000. Plaintiffs resting, the court denied garnishee's motion to find the issues for the garnishee. Thereupon William Garland testified in his own behalf substantially as follows: That on August 1, 1888, the amount due him under the mortgage and contract of October 20, 1887, was \$95,365.11; that he spoke to Hall and Bishop in their individual capacities, as well as representatives of the Shorthorn Cattle Company, at said time, about the title to part of the land in question being imperfect and defective, and then made them an offer to deduct \$10,000 of the indebtedness due him, to take back the property, and pay him the balance on easy terms. The court sustained an objection to this evidence. Thereupon the garnishee offered to show that, at the time of the execution of the several instruments hereinbefore referred to, it was represented by the plaintiffs that they included all the property of the several parties of the first part, and were a part of the ranch property included in the several instruments, and that upon the faith of that representation garnishee was induced to accept these several securities. The court excluded the same, upon the ground that the garnishee could not question his liability to respond for the property purchased by him on the ground that his deed did not convey all of it. The garnishee then offered in evidence a written contract dated August 4, 1888, for the purpose of showing the contract dated October 20, 1887, had been modified as to the price to be paid for the property, to which the plaintiff objected, on the ground that the garnishee could not, as against the plaintiff, reduce or change in any manner the purchase price after the service of garnishment summons. The court sustained the objection. The court also refused to allow the garnishee to show what was said or done in reference to the contract of October 20, 1887, by and between the

parties thereto in August, 1888, or after the period of nine months specified therein, or any agreement made between the said parties, changing the terms of the contract of October 20, on the ground that the garnishee could not make any new contract after the rights of plaintiffs were fixed by service of the garnishment process. The court also withdrew from the jury garnishee's testimony that he had possession of the property from October 20, 1887, to August 1, 1888, as mortgagee, in accordance with the terms of the October contract. The court excluded all offers on the part of the garnishee tending to show any change in the relation of the parties, or any change in the terms of the original contract. Thereupon the jury, under the direction of the court, found the issues for the plaintiff, and that the garnishee was indebted to the defendant company in the sum of \$3,123.43. Garnishee, upon nine alleged grounds of error, moved the court to set aside the verdict and for a new trial, which motion being overruled, the garnishee brought the cause to this court upon writ of error.

William Garland, plaintiff in error, was garnished under an execution issued in favor of Sperling Brothers against the Shorthorn Cattle Company, in pursuance of the provisions of section 2159, Compiled Laws, 1884. The only question that could be tried on the garnishee's answers to the judgment creditor's interrogatories was the existence of a money indebtedness due and payable, or to become due and payable, from the garnishee to the judgment debtor. *Perea v. Col. Nat. Bank*, 27 Pac. Rep. 322. On the trial of the issues between the judgment creditor and the garnishee, the contract of October 20, 1887, was offered and received as primary evidence of an inchoate, legal indebtedness that matured and became absolute on and after August 1, 1888. If such were the legal effect of this instrument, the court below was correct in holding that the garnishee could

not be permitted to show any change voluntarily made by the parties to the contract, affecting the rights of the defendants in error after the service of the garnishment process. Upon the same theory, the court was equally correct in denying to garnishee the right to show that the deed dated August 27, 1888, conveying to Garland the property in question, was not made in pursuance of the original contract, but was made under a new arrangement, evidenced by the agreement of August 4, 1888, for a consideration of \$10,000 less in amount than the price fixed by the contract of October 20, 1887.

It follows that the chief, if not the only, question properly presented for determination in this proceeding is, was Garland legally indebted to the cattle company under the contract of October 20 at the time that the garnishment summons was sued out and served upon him? If he was, the court's rulings were consistent

GARNISHMENT:
mortgagee in
possession with
option to purchase.

and correct; if he was not, the defendants in error were erroneously allowed to introduce testimony resulting in the verdict against him. We hold that the contract did not create the legal relation of debtor and creditor between Garland and the company. For some time prior to October 20, 1887, the company owed Garland, on advanced loans, more than \$80,000. On the last mentioned date, such indebtedness remaining wholly unpaid, Garland and the company made a written contract, defining their respective rights and obligations. Clearly, before the execution of this contract, Garland was the creditor and the cattle company the debtor. Did the contract invert such relation? By its terms does it appear that the Shorthorn Cattle Company assumed the obligations of vendor and creditor, and the plaintiff in error those of vendee and debtor, and that such obligations became absolute on the first day of August, 1888? Pursuant to the con-

tract, Garland took possession of the property on November 1, 1887, as mortgagee in possession after condition broken, with the conceded right to purchase the same for \$100,000, less the mortgage debt, interest, and expenses, on or before August 1, 1888; the cattle company binding itself to sell, and by good and sufficient conveyances, and other assurances of title, to convey, to Garland all such property on said terms: provided, however, that it had not previously paid Garland the full amount of the debt due him. It is clear that by the terms of this contract Garland remained creditor and the cattle company the debtor up to the first day of August. Did the contract, *ex proprio vigore*, after that date, not only convert Garland into a legal debtor,—a vendee, instead of a mortgagee in possession,—but did it also possess such retroactive properties as to create the relation of debtor and creditor from its inception? Unless we give it this effect, the position taken by the defendants in error is untenable. Whilst this contract could not execute its own provisions, it fixed the relations of the parties, those of mortgagor and mortgagee, and afforded the garnishee the means of changing these relations by a foreclosure of the mortgage and the purchase of the premises at the sale, in case the company was unable or unwilling to pay the debt or voluntarily convey the property. In no other way, under the contract, could Garland become vendee in possession, legally liable for the whole or any part of the purchase price of the premises.

In justice to the learned judge who tried the cause in the court below, it must be conceded that the doctrine here held was not pressed or presented by counsel on either side in the light required by the statutory provisions regulating such proceedings. Section 2159 of the Compiled Laws of 1884 says: "When any execution shall be placed in the hands of any

officer for collection, he shall call upon the defendant for payment thereof, or to show him sufficient goods, chattels, effects, and lands whereof the same may be satisfied; and, if the officer fail to find property sufficient to make the same, he shall notify all persons who may be indebted to said defendant not to pay said defendant, but to appear before the court out of which said execution issued, and make true answers on oath concerning his indebtedness, and the like proceedings shall be had as in cases of garnishees summoned in suits originating by attachments." By the obvious force of this section, the person garnished must be indebted to the defendant before process can issue. A claim moral or equitable in its nature is not sufficient. The indebtedness must be legal, as distinguished from an equitable demand. It is essential under this section that the debt be in existence at the time of the serving of the garnishment summons, absolutely and unconditionally owing and payable at the present or some future time. If it is a legal debt, it must be enforceable in an action at law, when payable, against the debtor. Its payment must not be made dependent upon the existence or performance of contractual conditions. Such appear to be the principles regulating garnishment proceedings in jurisdictions having statutory provisions similar to our own. *Hopson v. Dinan*, 48 Mich. 612; *Edney v. Willis*, 36 N. W. Rep. (Neb.) 300; *Coburn v. Ansart*, 3 Mass. 319; *Scales v. Southern Hotel*, 37 Mo. 520; *Weil v. Tyler*, 43 Mo. 581. "If the contract between the parties be of such a nature that it is uncertain and contingent whether anything will ever be due in virtue of it, it will not give rise to such a credit as may be attached; for that can not properly be called a debt which is not certainly and at all events payable, either at the present or some future period." *Drake, Attach.*, sec. 551. By the express terms of this contract, the cattle company had

the legal right at any time from the date thereof until August 1, 1888, to redeem by paying Garland the amount due on his notes. In the event of the payment, the latter could never become the debtor of the company. Plaintiff offered other testimony, it is true, for the purpose of showing the existence of the indebtedness between the garnishee and the cattle company, but it had exclusive reference to rights and obligations accruing or assumed under the contract of October, 1887. If, as we hold, the debt mentioned must be absolutely and unconditionally payable at the present or some time in the future, and must be so, under the section stated, when the process is served upon the garnishee, it follows that the court acquired no jurisdiction of the subject-matter, and should have discharged the garnishee and dismissed the proceedings.

The foregoing views sufficiently dispose of the grounds of error assigned by the garnishee in this court, with the exception of the point suggested by him in the court below, that it did not appear by the sheriff's return nor otherwise that that officer had ever made the demands required by section 2159 before applying for and serving the garnishment summons. There can be no doubt that a substantial compliance with all the requirements of the statute in that respect is essential to jurisdiction. A third party, in no wise indebted to or interested in the demands of the judgment creditor, should not be harassed by being compelled to participate in other people's lawsuits, unless by virtue of a statute authorizing such intervention. The record in this case does not show that the sheriff ever demanded payment of the judgment debt from the judgment debtor, nor does it show that he made any demand at all, before applying for the garnishment summons. The officer, it is true, may have done so without making the proper return. In the absence of such return, can the presumption be indulged against third parties,

strangers to the record, that the sheriff did what the law required him to do, before serving the process upon the garnishee? If it can not, the summons issued without authority. Ordinarily, in other jurisdictions, instead of the official demands required of the sheriff by section 2159, the right to this remedy must appear by affidavit, and such affidavit must be filed before process issues, or the court will acquire no jurisdiction. *Hinkley v. St. Anthony Falls, etc.*, 9 Minn. 55; *Chanute v. Martin*, 25 Ill. 63; *Steen v. Norton*, 45 Wis. 412, 415. It is hardly open to question that in garnishment proceedings the plaintiff can not subject the third party to the jurisdiction of the court unless he has complied with the statutory prerequisites. *Stickley v. Little*, 29 Ill. 313; *Black v. Busman*, 3 Minn. 360.

Without deciding the point, for the reason that it was not properly raised in the court below, and is not necessary to the proper disposition of the cause at bar, we are of the opinion that, if the garnishment summons is issued before the sheriff has complied with the requirements of the statute in this respect, the same is void. We are further of the opinion that the evidence of such compliance should appear of record. The sheriff is not entitled to the presumption claimed when jurisdiction is dependent upon the performance of the duty.

For the errors pointed out, the order denying the motion for a new trial, etc., will be reversed, the verdict set aside, and the cause remanded for further proceedings, in accordance with the views herein expressed.

SEEDS, LEE, and McFIE, JJ., concur.

[No. 507. August 24, 1892.]

**TERRITORY OF NEW MEXICO EX REL. CHARLES
W. DUDROW, PLAINTIFF IN ERROR, v. L.
BRADFORD PRINCE, GOVERNOR, ET AL.
DEFENDANTS IN ERROR.**

STATUTES—SECTION 2, CHAPTER 94, LAWS, 1891, CONSTRUED.—In a proceeding by mandamus, by the holder of a territorial warrant, against the governor, auditor, and treasurer of the territory, to compel them to issue to him in lieu thereof territorial interest-bearing bonds in conformity with the provisions of section 6 of an act of February 8, 1889, in relation to the finances of the territory, based on section 2, chapter 94, Laws, 1891, which was part of an amended bill in the hands of a committee, appointed to make amendments, who, finding it impossible to rewrite the same before the hour of final adjournment of the session by limitation, inserted after section 1, and directly above section 2, formerly unamended for want of time, a note that, “the amendments in section 2 coincide with those of preceding section throughout, and amendments and notes to be changed to same”, —Held: The provisions cited, taken from the unamended section 2, authorizing the governor and treasurer to take up outstanding warrants for indebtedness against the territory, and issue in lieu thereof interest-bearing bonds, were never passed by the legislature, and the peremptory writ was properly denied.

ERROR, from a judgment in favor of defendants, to the First Judicial District Court, Santa Fe County. Judgment affirmed.

The facts are stated in the opinion of the court.

F. W. CLANCY for plaintiff in error.

The question to be decided is purely one of law, and this court will take judicial notice of what the law of the territory is on the subject. *Town v. Perkins*, 94 U. S. 267; *Walnut v. Wade*, 103 U. S. 689.

Whenever the question of the existence of a statute arises in a court of law, the judge has the right to

resort to any source of information which, in its nature is capable of conveying to his mind a clear and satisfactory answer to such question. *Blake v. National Bank*, 23 Wall. 319; *Gardner v. Collector*, 6 Id. 508; *Suth. on Stat. Const.*, sec. 294.

It is the legislative intent, as expressed in the statute, which is to be ascertained. Such intent to be efficient must be set out in a statute. *Suth. on Stat. Const.*, sec. 234, p. 310.

A statute is "the written law of the legislature solemnly expressed according to the forms necessary to constitute it the law of the state." *Bouv. Law Dict.*, tit. "Statute;" *Endlich on Stat.*, sec. 1, note 1. See, also, *Black's Law Dict.*, p. 1121; *Anderson's Law Dict.*, p. 969; 1 *Kent, Com.* 446.

To ascertain the legislative intent resort can not be had to the journals of the legislature, nor to other evidence extrinsic to the act itself, unless such resort be authorized by constitutional or legislative provisions. *Suth. on Stat. Const.*, secs. 35, 183; *Pangborn v. Young*, 32 N. J. Law, 29; *Sherman v. Story*, 30 Cal. 253; *Field v. Clark*, 143 U. S. 672-680.

The uncertainty and ambiguity of the note recited in the act make it inoperative and void. *Drake v. Drake*, 4 Dev. 115; *State v. Pantlow*, 91 N. C. 553.

EDWARD L. BARTLETT, solicitor general, for defendants in error.

In the absence of any precedents for a case like this, the general rules for interpretation of the legislative intent must govern in all cases where it can be ascertained from the act itself, its context, title, preamble, and the journals of the body which passed it, and any other aids to that end. *Suth. Stat. Const.*, secs. 234, 260, 300, 292; *Blake v. National Bank*, 23 Wall. (U. S.) 319.

This court must act on the record; it can not take testimony. Compiled Laws, sec. 2190.

In construing a statute the effects and consequences to the public will be considered. *Suth. Stat. Const.*, secs. 322-324; 7 *Lawson on Rights and Rem.*, sec. 3773, and cases cited.

As to the language used by the conference committee that the amendments in section 2 "coincide" with those of the preceding section, the word "shall" should appear before "coincide" to make the intent clear, and the law will supply it when necessary. *Suth. on Stat. Const.*, sec. 260, and cases cited.

O'BRIEN, C. J.—On the twelfth day of March, 1892, on the petition of the relator, an alternative writ of mandamus was issued out of the district court for the county of Santa Fe, directed to the governor, auditor and treasurer of the territory, reciting, *inter alia*, that said Dudrow had filed an information alleging that he was the holder of an outstanding territorial warrant for the sum of \$272.90, and that, as such holder, he was entitled, by law, to have said warrant converted into territorial interest-bearing bonds, issuable in conformity with the provisions of section 6 of an act entitled, "An act relating to the finances of the territory of New Mexico," approved February 8, 1889. It then alleged a demand made upon the respondents for the execution and delivery of such bonds, and their refusal to comply therewith, on the sole ground that the issuance thereof was unauthorized by law. The writ commanded the respondents to make and deliver the bonds, or to show cause for their failure so to do. In their answer to the writ they admitted all the allegations thereof, with the exception that, under the laws of the territory, they had no authority to issue such bonds in exchange for relator's warrant. Upon a trial of the issue so made, the court denied the application,

dismissed the alternative writ, and ordered judgment for cost against the relator. Thereupon the latter brought the cause to this court for review, upon the ground of error in the court's refusal to award a peremptory writ, so that the only question submitted for determination is, was there any territorial enactment in force at the time, making it the duty of the respondents, the defendants in error, to issue to the relator the interest-bearing bond or bonds demanded in lieu of the warrant which he held?

The source of the contention and of the honest difference of opinion between the relator and the respondents in reference to their respective rights and duties must be sought in the peculiar circumstances existing when chapter 94, Laws, 1891 (the Finance Bill), passed the legislature. The object of this act was to provide funds and make appropriations for the forty-second and forty-third fiscal years, "and for other purposes." The forty-second fiscal year began on the first Monday of March, 1891, and the forty-third on the corresponding day in the year 1892. The session of the legislature at which the act in question passed expired by limitation on the twenty-sixth of February, 1891. Section 1 of the act provided funds and made all needed appropriations for the forty-second fiscal year; section 2, by its terms, was intended to make provisions for the forty-third fiscal year. The relator bases his right to the remedy sought in this action upon a certain "proviso," which he maintains, and which the respondents deny, is found in section 2 of the act.

In order to make our language intelligible, an explanation must be premised. The act in question (chapter 94, Laws, 1891, "Finance Bill"), embracing twenty sections, fills forty-three pages, of which sections 1 and 2 occupy thirty-eight in the printed volume of the session laws of that year. Each of these two

STATUTES: CON-
struction of sec-
tion 2, chapter
94, Laws, 1891.

sections is unusually complex, surcharged with a strange variety of detailed items and multifarious provisions. The bill as originally introduced in the council on January 23, known as "Council Bill No. 81," passed that body on the sixth day of February. When transmitted it found little favor in the other chamber. On the eve of the final adjournment of the legislature, it was indefinitely postponed by the house, and in lieu thereof "House Substitute for Council Bill No. 81" was offered, considered, read a third time, and passed. The latter bill, when transmitted to the council, was not approved, and instead thereof that body adopted a bill bearing the elongated title of "Council Substitute for House Substitute for Council Bill No. 81." On the following day, February 26, the last legal day of the session, the house was notified officially that the council had appointed a committee of three for the purpose of conferring with a like committee of the house in regard to the passage of what was originally known as "Council Bill No. 81," and requesting the house to appoint a like committee. This was immediately done. The joint conference committee met, deliberated, and reported their inability to agree upon the terms of "House Substitute for Council Bill No. 81." After various and protracted meetings on the same day, the last of the session, the joint conference committee reported that they had agreed and recommended for passage the bill known as "Council Substitute for House Substitute for Council Bill No. 81," whereupon the rules were suspended, and the latter bill was unanimously passed. The conferees, it appears, had barely time to rewrite section 1 of the bill, and, finding it impossible before the hour of final adjournment to amend in terms and rewrite section 2, they appended after section 1, and directly above section 2, formally unamended for want of time, the following note: "The amendments in [following] section 2 [for 43d fiscal

year] [shall] coincide with those of preceding section throughout, and amendments and notes to be changed to the same." This was signed by the six conferees. The words "following" and "shall," in brackets, we have inserted to remove all doubt as to the meaning. Then follows section 2, "as filed," unamended in terms, containing inter alia, the following provisions, upon which the relator bases his right of action: "For the redemption of warrants, any surplus which may exist over and above the funds necessary to pay the current expenses of the territory, as provided for in this act, and all outstanding warrants drawn after March 4, 1889, on account of indebtedness previous to said date, shall bear interest at the rate of six per cent per annum from the date of issue: provided, that any person holding outstanding warrants of the territory may at any time convert the same into bonds of the territory bearing interest at the rate of six per cent per annum, such bonds to be issued as near as possible in conformity with the provisions of section 6 of an act entitled, 'An act relating to the finances of the territory of New Mexico,' approved February 8, 1889, said bonds to be paid in ten years after date thereof; the cost of printing and issuing said bonds to be paid for by the holder of said warrants." Section 6 of the act of 1889, above referred to, provides, among other things, that "said bonds shall be signed by the governor and treasurer, and countersigned by the auditor." The provisions above cited, claimed by the relator to be a part of chapter 94, Laws, 1891, are not found in section 1 nor in section 2 of the act as amended, according to the terms of the note of the joint conference committee. It is found, it is true, as part of the unamended section, filed with the secretary, and as such was inserted in the printed volume.

In view of all the facts, we have no hesitancy in holding that the provisions cited, taken from the un-

amended section 2, were never passed by the legislature. No such language is found in section 1 of the law, and we are clearly of the opinion that it was expressly eliminated from section 2 by the concurrent act of both houses, in approving and adopting the report of the joint conference committee, and in passing the act in accordance with the terms of that report. Inasmuch as the printed volume of the Laws of 1891 contains two versions of section 2 of chapter 94, and as they are in many respects variant and inconsistent, and their presence in superposition may lead to confusion and doubt, we hold that, as far as we are able to determine from the case before us, an examination of the original bill and the journals of the two houses, section 2, as found in the printed volume of the Laws of 1891, beginning on page 219, and ending at page 230, was legally passed, and is a valid enactment; and that all of the provisions found in the other section 2 of said chapter, beginning at page 207, and ending at page 219, in said printed volume, were not legally passed by the legislature, and are of no binding force or effect.

It is needless to say more. This court can not afford to be technical with the lawmaking power of the territory. Our province is to interpret and obey the will, not to criticise the *modus operandi*, or dictate the policy, of a legislature, created by the power of the general government. In justice to the representatives of the people it must not be forgotten that the legislature was on the eve of a final adjournment when the bill passed. The house had refused to pass the finance bill adopted by the council. A final adjournment without such an enactment would be more than a calamity,—it would be a public disaster. To prevent such a misfortune, haste and disregard of the usual formalities seemed imperative. Notwithstanding all this, it scarcely admits of doubt that the legislature clearly expressed

the intent, when it adopted the report of the joint conference committee, that section 2 of chapter 94 should contain the substantial provisions embraced in section 1, and that all provisions found in the former, not embraced in the latter, should be expunged. The principle that "*id certum est, quod certum reddi potest*," is as applicable to legislative bodies as to individuals.

We have not overlooked the many serious objections raised by the learned counsel for plaintiff in error in his oral argument, as well as in his able brief, to the many uncertainties and errors incident to this "clumsy" sort of legislation. As to the point upon which he very strenuously insisted that section 2 of the act, which we hold to be good law, contains certain provisions not found in section 1, we must say that, even if he is correct, that fact does not improve his condition in reference to the provision upon which he rests his right to maintain this action. That provision is found in neither section. If the section 2, which passed in accordance with the report of the committee, contains provisions not found in section 1, of doubtful validity, that does not justify his position. Such doubtful provisions will be determined by the courts when they arise, but they are not in this case. All that is necessary for us now to decide is that the legislature, in adopting the report of the conference committee, virtually passed section 2, as recommended by that report; that the provisions authorizing the respondents to issue interest-bearing bonds in lieu of certain territorial warrants were not embraced in that recommendation, and hence that the relator has no legal ground upon which to base the right for which he contends in this action. Section 1 must be the norma by which to determine what parts of the original, uncorrected draft of section 2 were passed in accordance with the recommendation of the committee's report. The territorial secretary is the legal custodian of all these documents, and that

officer is eminently entitled to the presumption that in collating the two sections, and in preparing and arranging section 2, he included no provision therein not fully authorized by legislative sanction. For us to adopt any other course in such an emergency, when examining the acts of a coordinate branch of the territorial government, might prove a source of mental gratification to legal erudition, and the varied refinements of professional genius, but would as unmistakably lead to the perversion of judicial discretion and the impairment of the freedom of legislative action.

For the reasons and in the manner stated, it must be apparent that section 2, though not actually, was potentially, amended by the concurrent act of both legislative houses as legally as section 1. This ought to be sufficient, especially when the political safety of the territory for a whole year was dependent upon the validity of the act.

Finding no error in the record, the order and judgment of the court below are affirmed.

LEE, McFIE, and FREEMAN, JJ., concur.

[No. 516. August 24, 1892.]

EDWARD G. BERRY ET AL., APPELLEES, v.
HENRY HULL ET AL., APPELLANTS.

ELECTION CONTEST—COUNTY SEAT, ELECTION TO LOCATE—PLEADING—EVIDENCE.—In a proceeding, by bill in equity, to contest an election to locate a county seat for San Juan county, which, it was admitted, sufficiently alleged the casting of illegal votes, by minors, nonresidents, aliens, and persons procured to vote by bribery, naming persons who had voted illegally, and charging that numerous other persons unknown to the complainants, had voted at said election “illegally and fraudulently,”—it was not error to admit evidence of illegal voting by persons other than those named in the bill.

ID.—AMENDMENTS—PLEADING.—In such proceeding, an amendment to the bill, to conform to the proof, naming such other persons, who, it was charged, had voted illegally, was properly allowed after the testimony was closed, under section 1911, Compiled Laws, providing that each party shall have leave to amend “at any time before verdict, judgment, or decree,” upon such terms as the court may think proper.

ID.—DECLARATIONS OF VOTER—EVIDENCE.—Evidence of the declarations of one, who voted at such election, as to his qualifications as to residence and the town he voted for, was, by itself, inadmissible, as was also an affidavit made by him sometime afterward as to the fact of his citizenship by naturalization, in the absence of any evidence that any effort had been made to take his deposition.

ID.—CERTIFICATE OF PRIEST—EVIDENCE.—The certificate of a priest, who had baptized a person, as to the age of such person, is inadmissible.

ID.—PLEADINGS—EVIDENCE.—In an election contest, to locate a county seat, where the bill alleges that a certain person voted for a certain town, and such allegation is not denied by the answer, it will be taken as admitted.

ID.—QUALIFICATION OF VOTERS—NATURALIZATION—CERTIFICATE OF CITIZENSHIP.—Under section 1141, Compiled Laws (Organic Act, sec. 6), providing that the right of suffrage shall be exercised only by citizens of the United States, and sections 2004, 2165, Revised Statutes, United States, providing that all citizens of the United States otherwise qualified by law to vote at any election, etc., shall be entitled to vote, and that foreigners of twenty-one years of age, with certain exceptions, must make a preliminary statement of their intention to become citizens at least two years before legally made such, — a person of foreign birth, not within the exceptions named in the statute, who did not take out his citizenship papers until after he had voted, and whose father was not naturalized until after he had attained his majority, was not a qualified voter.

ID.—CITIZENSHIP—PROOF.—The certificate of intention to become a citizen of the United States is the only competent proof of that fact.

ID.—QUALIFICATION OF VOTERS—SECTION 2166, REVISED STATUTES, UNITED STATES, CONSTRUED.—An alien who had served in the marine service of the United States, and had been honorably discharged, but who had not been naturalized, was not a legal voter, under section 2166, Revised Statutes of the United States, providing that any alien over twenty-one years of age, who has enlisted in the armies of the United States, and been honorably discharged, may become a citizen after one year's residence without any previous declaration of his intention to do so, the statute only intending to exempt such persons from making the declaration of intention.

ID.—PARTIES TO RECORD—EVIDENCE.—In a proceeding to contest an election, locating a county seat, all persons voting at such election are parties to the proceeding, though not made parties, for the purpose of admitting evidence of their declarations as to their qualifications and motives in voting for a particular town, when the fact that they voted for such town has first been established by evidence aliunde.

ID.—BRIBERY—EVIDENCE.—Where, in such proceeding, it appeared from the evidence that a company organized in the interest of Junction City, one of three towns competing for the location of the county seat, previously and up to the day of election, and not afterward, issued to voters of the county certificates of sale of valuable lots, for which there was no consideration, and upon the presentation of which deeds were to be made on the payment of \$1 per lot, but not until after the election, by a limited time after which none would be made; and there was evidence that these payments were not to be made for the lots, but for making the papers; also that the subject of voting for Junction City was mentioned whenever a certificate was issued,—Held: The issue of such certificates of sale of lots to voters, and deeds to be made to them, was an "inducement," within the meaning of section 4, chapter 135, Laws, 1889, to vote for Junction City, and constituted bribery, although the voters receiving them testified they were not given for that purpose, and that they were not influenced thereby, upon the showing that the offer was illegal, and of the acceptance, the jury might well presume, in the absence of contradictory evidence, that the taking was illegal.

ID.—BARGAIN FOR VOTES.—Where it further appeared, in such proceeding, that before the election a committee from a voluntary association of citizens of the town of Largo, organized in its interests, with the intention at first of entering the contest for the location of the county seat, met a committee from an association of the town of Aztec; and it was agreed between them that the latter association should give to the former one half of its town lots and a certain portion of a forty acre lot, and pay them for a certain piece of land they had purchased in Largo for county purposes, in consideration that Largo would withdraw from the contest, and that the Largo people would work for Aztec,—Held: The Largo association was not a legal organization, the acts of whose representatives could bind any one but themselves, unless there was proof positive that the voter presumed to have been represented was shown to have directly authorized someone to act for him, and votes in favor of Aztec by residents of Largo, not parties to the agreement, were not illegal, in the absence of such proof, or that they received any benefit from the agreement. But those votes cast for Aztec, by residents of Largo, who were parties to such agreement, were illegal.

ID.—QUALIFICATIONS OF VOTERS.—RESIDENCE.—A person formerly residing in this territory does not forfeit his right to vote by absence from the territory for the time specified in section 1214, Compiled Laws, providing that a citizen to be entitled to vote must be a resident of the territory, county, and precinct for a certain time “immediately preceding the election,” unless it be shown it was his intention to change his residence: the mere fact of his being out of the territory with a camping outfit was not sufficient to show such intention.

ID.—QUALIFICATION OF VOTERS—CHANGE OF RESIDENCE.—A married man who moves his family outside of the territory, and there rents and cultivates a farm, shows, by such act, his intention to change his residence, and is not a qualified voter.

APPEAL, from a decree in favor of complainants, from the First Judicial District Court, San Juan County. Decree affirmed.

The facts are stated in the opinion of the lower court, herein set out, and referred to in the opinion of the supreme court as “in the main correct,” in its findings of fact, and the application of the law thereto.

N. B. LAUGHLIN for appellants.

The attention of the court is called to the rulings of the court below in permitting complainants to withdraw their replication and file their fourth amendment, after they had taken their testimony and closed their case; also to the rulings of the court in overruling the motion of the defendants to strike out the fifth amendment to the bill, without requiring them to withdraw their replication, and giving respondents leave to answer it, and take additional testimony, and, after arguments were closed and the cause closed and submitted, amendments not allowed after publication. 1 Danl. Ch. Pl. & Pr., sec. 416; Story, Eq. Pl., secs. 87, 265, and note; Thorn v. Germand, 4 Johns. Ch. 363; Mitford's Pl. 257, 258, 259; Shephard v. Merrill, 3 Johns. Ch. 425; Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 46; Rogers v. Rogers, 1 Paige, Ch. 424;

Whitman v. Campbell, 2 Paige, Ch. 67; Hardin v. Boyd, 113 U. S. 771.

Complainants' remedy was by supplemental bill, and they could have set up the new facts as charged in the amendment. Shephard v. Merrill, 3 Johns. Ch. 423; Bowen v. Idly, 6 Paige, Ch. 49; Walden v. Bodly, 14 Pet. 160.

The act of the legislature, Laws, 1889, section 8, page 317, has no application to the case at bar; it applies only to candidates for office. Calaveras County v. Brockway, 30 Cal. 337.

Fraud and bribery must be charged distinctly, and with certainty, that the respondent may be apprised of all the facts which he is required to meet. 1 Danl. Ch. Pl. & Pr., sec. 324; Story, Eq. Pl., secs. 255-257. See, also, Moore v. Green, 19 How. 69; Harding v. Handy, 11 Wheat. 103.

The hearsay testimony should have been excluded and the direct and positive denial of the voters taken, and their votes allowed to stand as cast and counted. Gilleland v. Schuyler, 9 Kan. 569; Tarbox v. Sughrue, 12 Pac. Rep. 935; People v. Commissioners, 7 Colo. 190; Norwood v. Kenfield, 30 Cal. 398; McCrary on Elec., secs. 270, 271; State v. Deniston, 26 Pac. Rep. 743. See, also, Little v. Robbins, 2 Cong. Elec. Con. 138; Gooding v. Wilson, 4 Id. 79; Strobach v. Herbert, 6 Id. 7; Norris v. Hanley, 4 Id. 75; Ingersol v. Naylor, 2 Id. 33.

If the lots were sold for \$1 each to electors, not in the way of a bribe, and without any understanding, either expressed or implied, that they should vote for Junction City, then the sale was legal and proper. United States v. Foster, 6 Fed. Rep. 247; State v. Deniston, 26 Pac. Rep. 742; Tarbox v. Sughrue, 12 Id. 935; Blue v. Peter, 20 Pac. Rep. 450; Paine on Elec., secs. 770, 774, 775.

On the subject of bribery and undue influence, see 6 Am. and Eng. Encyclopedia of Law, 360-375.

Fraud and bribery will not be presumed; they must be proved, and the burden of proof is on the complainants. *Frost v. Metcalf*, 5 Cong. Elec. Cas. 439.

Perea v. Gallegos, 5 N. M. 102, is not applicable to the case at bar. In that case the counsel moving for leave to amend made affidavit setting out the grounds fully.

EDWARD L. BARTLETT for appellees.

Amendments to the bill in order that it might conform to the proof taken, are distinctly allowed by the statute. Comp. Laws, sec. 1911; *Perea v. Gallegos*, 5 N. M. 102. See, also, Equity Rule 40 of this court; *Lyon v. Tallmadge*, 1 Johns. Ch. 184; *Hardin v. Boyd*, 113 U. S. 756; *Mix v. People*, 4 N. E. Rep. (Ill.) 783; *Church v. Holcomb*, 7 N. W. Rep. (Mich.) 167, 173; 6 Am. and Eng. Encyclopedia of Law, 807, 808; *Connalley v. Peck*, 3 Cal. 75; *Midmer v. Midmer's Ex'rs*, 11 C. E. Green, Eq. (N. J.) 299; 1 Danl. Ch. Pl. & Pr. 418, and cases cited; 1 Bar. Ch. Prac. 213, 214; *Sweatt v. Faville*, 23 Iowa, 326-328.

Under the old law, section 1170, Compiled Laws, the contestant was required to specify the names of the voters whose votes he intended to challenge; but the law as it now stands only requires the notice to set forth the grounds upon which the contest is based. Sec. 8, chap. 135, p. 317, Laws, 1889. See, also, *Story*, Eq. Pl., sec. 28; *Camden & Amboy Railroad v. Stewart*, 4 C. E. Green, Eq. (N. J.) 346.

In England, and in several of the states the declarations of voters are admitted, as being parties, and against their interests, and in regard to matters of public and general policy. *McCrory on Elec.*, secs. 448, 449; 6 Am. and Eng. Encyclopedia of Law, pp.

429, 436; Patton v. Coates, 41 Ark. 111; People v. Pease, 27 N. Y. 45; State v. Olin, 23 Wis. 319; Beardstown v. Virginia, 81 Ill. 541.

In this case the court sat as a jury; and where there is sufficient legal evidence in the record to sustain the decree, the presumption is that on the final hearing the chancellor considered the legal evidence only. Sawyer v. Campbell, 2 N. E. Rep. (Ill.) 660.

In an election contest all votes obtained by "paying or agreeing to pay money or property or anything of value therefor" will be rejected upon proper proof, by the court or tribunal trying the case. McCrary on Elec., secs. 180, 181; State v. Olin, 23 Wis. 319, 327; People v. Pease, 27 N. Y. App. 45, 52, 69, 71; State v. Purdy, 36 Wis. 218; City v. City, 81 Ill. 549, 550; State ex rel. Sullivan, 23 Pac. Rep. 1054-1060. See, also, 6 Am. and Eng. Encyclopedia of Law, p. 336, and notes; Id., 372, and notes.

The jury may infer such an agreement from the circumstances of the case, even in a criminal prosecution for bribery. Roscoe's Crim. Ev. 327.

The findings of fact, by the court sitting as a jury, are conclusive. Sawyer v. Campbell, 2 N. E. Rep. (Ill.) 660.

OPINION OF TRIAL JUDGE.

SEEDS, J.—"According to chapter 7 of the Laws of 1889 of this territory, the legal voters of San Juan county were authorized, at the general election of 1890, to vote upon the question of locating a permanent county seat for their county. In accordance with the requirements of that law, a vote was had upon November 4, 1890, that being the general election, there being three places voted for, to wit, Junction City, Aztec, and Farmington. The board of county canvassers duly declared Junction City as the county seat, it having a majority of nine over Aztec, the next nearest

competitor. The county seat had been temporarily located at Aztec. Upon the declaration of the result, the complainants herein instituted proceedings in equity to restrain the defendants, who were officials of the county, from removing the records from Aztec to Junction City, and for such other and further relief as may be equitable in the premises. A temporary injunction was allowed, but upon the hearing it was dissolved, and the records were removed to Junction City. There were various amendments allowed to the bill, after which the case was referred to an examiner to take testimony. Testimony was taken during the months of August and September, 1891. After the testimony was closed, the complainants asked leave to amend their bill to make its allegations conform to the testimony. The defendants objected to the allowance of this amendment, both by motion to strike out and by saving their rights in their answer. The defendants asked more time to take further testimony. During the taking of this testimony the complainants introduced evidence tending to show that three persons who had voted for Junction City were not at that time citizens of the United States. Thereupon they asked leave to amend their bill again to conform their allegations to the proof. To this request the defendants objected. Upon an intimation from the court that, if it granted the amendment, it would give the defendants more time to take testimony, the complainants withdrew their motion, insisting that the proof was material and seasonable upon the general allegations of the bill. At the hearing the defendants first insisted upon their motion to strike the amendment from the files, which was filed after the taking of the testimony.

ELECTION to locate county seat: pleading: evidence.

Upon that motion I am first to pass. Before doing so, however, it will be necessary to look at the allegations of the pleadings which are legally, and unquestioned, in the case.

In the original bill upon which the injunction was asked, it is alleged 'that at such pretended election * * * numbers of illegal and fraudulent ballots were cast, which ought not to have been received or counted by the judges of election of the various precincts.' Then there is an allegation that one Sam Johnson had voted for the place known as 'Junction City,' who had only been in the territory forty days; and, continuing, the bill says 'that numerous other persons, to your orators unknown, likewise voted illegally and fraudulently at such election, and voted in favor of the location of the county seat at the place known as "Junction City;"' that there were more than enough of such illegal and fraudulent ballots cast for the location of the county seat at Junction City to change the result,' etc. They further allege that certain parties interested in Junction City 'illegally and fraudulently bribed and bought a large number of the legal voters * * * to cast their ballots in favor of said place known as "Junction City," instead of the town of Aztec;' and then they set out by what means they bribed the persons alleged to have been illegal voters. In their first amendment to the bill they go on to specifically name who were illegal voters, and whether so by reason of noncitizenship, minority, or bribery.

"When, then, the complainants introduced testimony as to any other parties than those already named in the bill and its first amendment, the defendants objected because there was no allegation as to those parties, and now strenuously contend that it is too late to amend the bill to conform with that proof. The contention of the defendants is, in the first place, that there can be no evidence as to illegal voting, unless the party as to whom the evidence applies is first named in the bill. Is this contention sound? There is no statute requiring the naming of the parties in an action of this character. By section 1170, Compiled

Laws, 1884, any candidate at an election could contest the election of his opponent by giving him notice, in which notice he was to give the names of the voters and the objections upon which he based his contest. The notice was, in fact, his petition. But by section 8, chapter 135, Laws, 1889, this was changed, so that now the contestant only has to set forth the grounds upon which he bases his contest. So, by no rule of analogy can it be said that in such a proceeding as this the complainants are bound to give the names of those who cast illegal votes. Is it required by any rule of pleading? But by every rule of pleading it is required that the allegations should be of ultimate facts, not of those facts which are simply testimony, and tend to prove the ultimate fact. It is true that pleading legal conclusions, or fraud generally, is forbidden, and, if taken advantage of by motion or demurrer, may cause the bill to be dismissed or amended. But in this case there has been no objection to the allegations of the bill, but are not the allegations of the bill as above set out substantially good? What is the cause of action? The statute under which this vote was taken says legal voters shall vote. If, then, illegal votes are cast, they should not be counted for the place for which they are cast. How should you allege that fact? By simply stating that a person or persons did cast an illegal vote. It makes no difference who cast it; if it was illegal, that is sufficient. It possibly would have been bad pleading to have alleged generally that there was illegal voting, or fraudulent voting; but there can be no objection to alleging illegality or fraud when the means by which it was accomplished is fully alleged, as it most certainly is in this bill. So, independent of the amendments, as long as the case was open for taking testimony, the complainants were legally entitled, under the allegations of their bill, to prove that persons were bribed to vote, or were not

citizens, and therefore that the ballots cast by them were illegal; and all objections interposed to the reception of evidence, because there was no allegation as to specific persons in the bill, are overruled.

“But, even if I am wrong as to this proposition, I am convinced that the complainants had a perfect right to file the amendments which they have, including the last one withdrawn by them. The ground

AMENDMENTS: upon which the defendants contend that
pleading. the amendments should be excluded is

that at the time they were offered the testimony was closed, and it was too late. The old rule undoubtedly was: ‘An order for leave to amend a bill may be obtained at any time before answer, upon motion or petition without notice; and, for the purpose of adding parties only, an order for leave to amend may be obtained in like manner at any time before the cause is set down for hearing;’ also ‘an order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates, or sums, may be obtained at any time.’ 1 Daniel, Ch. Pl. & Pr.[4 Ed.], pp. 409, 410, 416; 6 Am. and Eng. Encyclopedia Law, p. 807. This was undoubtedly the common law rule, and, strictly, no amendments were allowed after the testimony was in, except as above set out. But that this was not an inflexible rule is evident from the fact that courts had gone so far upon the hearing of an appeal as to allow the plaintiff to change his bill into an information and bill, or information only. 1 Daniel, Ch. Pl. & Pr., p. 418.

“But that this rule has been materially changed and made more liberal by statutes and adjudications admits of no doubt. The rule now undoubtedly is that all amendments which do not change the substantial character of the bill, or which tend to further the ends of justice, are permissible, resting in the sound discretion of the chancellor, at any time previous to the

entering of the decree. 6 Am. and Eng. Encyclopedia Law, pp. 807, 808. Church v. Holcomb, 7 N. W. Rep. (Mich.) 167-173; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. Rep. 771. It is said that an amendment may be filed after the case is decided. Sawyer v. Campbell, 2 N. E. Rep. (Ill. Sup.) 660. And it is held error not to allow the complainant to amend at hearing to correspond with proof. Mix v. People, 4 N. E. Rep. (Ill. Sup.) 783. In the case of Hardin v. Boyd, supra, the error alleged was that the chancellor at the hearing had allowed the complainants to amend the prayer of their bill asking for something not contemplated by the allegations of the bill.

“In passing upon this point, which the court held not to be error, Mr. Justice HARLAN says: ‘It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs.’ The rule is thus stated in Lyon v. Tallmadge, 1 Johns. Ch. 184, 188: ‘If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or statement of facts or circumstances connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief. There must be equity in the case, when fully stated and correctly applied to the proper parties, sufficient to warrant a decree.’ Pages 761, 762, and 773. If, now, this is good law, wherein does the request in this

case to file amendments come in conflict with it? The testimony is all in, the expense is all made, and there is no showing of inconvenience. Will it change the substance of the case as made by the bill, and to which the parties have directed their proof? The substance of the bill, and to which the proof was directed, is that A. and B. cast illegal votes, that C. and D. were bribed, and their votes were illegal. Now, does it change this to say that E. and F. also did the same, or were likewise bribed? Does not the original bill and first amendment, over which there is no contention, and which the defendants have in no manner attacked, contain grounds for relief, if proven, and is there not equity sufficient alleged upon which to ground a decree? There certainly is, and hence it would be error, under this authority, for the court to refuse the amendments.

“But there is yet a further reason why these amendments should be granted. Our statute plainly gives the right to file such amendments to make the proofs correspond with the allegations, where the new allegations do not change the substance of the bill, or make an entirely new issue so late in the course of the controversy as, from that very fact, to work injustice to the opposite side. The statute reads: ‘Each party, by leave of the court, shall have leave to amend, upon such terms as the court may think proper, at any time before verdict, judgment, or decree.’ Section 1911, Compiled Laws, 1884. Evidently this statute was passed for a purpose. What was it? Clearly to enlarge the rights granted in pleading by the common law. As seen above, the general rule forbids amendments in equity cases after the taking of testimony, except as to parties and clerical errors; hence, it must be presumed that this statute was to grant something other than that which then existed. It does not exclude such amendments as those in question; hence, it must

contemplate them. I understand that the case of *Perea v. Gallegos*, 5 N. M. 102, fully sustains this position. The court quotes approvingly from *Connalley v. Peck*, as follows: 'Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed to conform the pleadings to the facts which ought to be in issue in order to enable the court to decree fully on the merits, and, whenever this is not done, it is error.' 3 Cal. 75. Also, 'where a matter has not been put in issue with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill, for the purpose of making the necessary alteration.' 1 Daniel, Ch. Pr. 418; *Lewis v. Darling*, 16 How. 1.

"The defendants insist that this case is not in point because of the character of the affidavit upon which the court granted or refused the amendment. Of course, each case must rest upon its own facts, and the decision must primarily relate to those facts, but usually the law declared is of general application. It is undoubtedly true that an affidavit may be insufficient, and because thereof the leave to file the amendment will not be granted. But that is not the contention here; the defendants nowhere by their motion raise that question. The cited case declares the law plainly, that, after testimony is all taken, the bill may be amended in other ways than by merely adding parties or correcting clerical errors. That is now the law of this territory. Against this proposition the defendants contended by their motion.

"It is finally urged that the matter should have been set up by a supplemental bill, and not by amendment. It is unnecessary to go into a consideration of the question as to when such a pleading is proper. It

may be conceded that new matter, arising after the filing of the bill, presenting new equities, under the general rule, should be pleaded by a supplemental bill. But that is not this case; all the matter here pleaded was in existence, for all its effective purposes, before the bill was filed. The mere fact that it became known to the complainants afterward does not alter the case. The statute was intended in all probability to meet just such a case. The defendant's motion is therefore overruled. And, if the complainants think proper, they are granted leave to file the amendment of ———, which was withdrawn at a suggestion of the court, which was clearly erroneous, and have it filed as of that date.

“I shall now proceed to consider the evidence offered by the complainants to sustain their issues. The record is very voluminous, as there were over one DECLARATIONS of
voter: evidence. fifth of the voters in the county examined at the various examinations. A great deal of the testimony is hearsay, beliefs, and suppositions and conjecture. I have given all of it a patient and careful study, and endeavored to arrive at the truth as it is to be found in the proof. Under the pleadings and proofs, the evidence may satisfactorily be considered under two heads: First, that in reference to alleged illegal votes cast by nonresidents, by those who were not citizens, and those who were not of age; and, second, that in reference to those votes which were cast by parties who are alleged to have been influenced by the selling or giving to them of lots in the places voted for.

“As to the first it is alleged that one Sam Johnson voted for Junction City, and was not at the time a citizen. The burden is, of course, upon the party attacking a person's vote to prove that it is illegal. When a person votes, the presumption is that he is a legal

voter. This man Johnson voted. There is evidence that he told one Berry and one Boat, just after the election, that he voted for Junction City, and that he had said he was not a resident. This evidence, standing alone, is, under my holding, inadmissible. There is evidence, though, that he was never in the county until some thirty or forty days before the election; that he was never seen there before. After the election he was arrested for illegal voting, and pleaded guilty to the charge. This was proved by the docket of the justice, and is sufficient. The defense, however, introduces an affidavit made by this Johnson sometime afterward, in which he states that he was a citizen by naturalization, and had been for five years in San Juan county, and that when he pleaded guilty to illegal voting he was drunk. I can not see how this affidavit can be considered as evidence. There is no rule of evidence that would allow of its admission, especially as there is no showing that there was any attempt made to take his deposition. The affidavit must be excluded. However, either with or without it, I am confident that he was not a legal citizen of San Juan county, and therefore not entitled to vote. Did he vote for Junction City? I do not think there is any legal proof that he did, but as the defendants in their answer have admitted that he did, there is no need of proof. His vote should be deducted from the number cast for Junction City.

“It is alleged that Jose Pablo Gallegos voted for Junction City, and that he was not then of age. It was attempted to prove this fact by the certificate of the priest who baptized him. In my judgment, that certificate was inadmissible. But one Lovato, his cousin, testified positively that he was living at the same place that Gallegos was when he was born, and that he knew that he was born

CERTIFICATE of
priest: evidence.

sometime in January, 1870. He is not contradicted or impeached, and I see no reason why I should not believe him. The voter was not, then, of age when he voted. But did he vote for Junction City? There is no evidence, except that he told Berry that he did. But the bill charges that he voted for Junction City, and the answer fails to deny it; hence it must be presumed that he did so. His vote should be rejected.

PLEADINGS:
evidence.

“Edward Thomas, Sr., and Edward Thomas, Jr., both voted for Junction City, as they both testified; but at the time the senior Thomas had not taken out his last papers, but he took them out in October, 1891, following the election. The junior Thomas took out his citizenship papers at the same time. Andrew Miller testified that he took out his first papers in 1877, but only took out his last papers in October, 1891; that he voted for Junction City. Max Wenzel testified that he voted for Junction City; that he was a foreigner, coming to this country when only sixteen years of age, and at once took out his declaratory papers; that he served from 1884 to 1887 in the marine service of the United States. It is alleged by the complainants that all four of these parties were illegal voters, and their votes should be rejected. Were they entitled to vote? By section 1141, Compiled Laws, 1884, it is provided that no person prevented by the organic law shall be entitled to vote in this territory. Section 6 of the organic law provides that after the first election the territorial legislature shall prescribe the qualifications of voters, ‘provided that the right of suffrage and holding office shall be exercised only by citizens of the United States,’ etc.; and by section 2004 of the Revised Statutes of the United States it is provided ‘that all citizens of the United States who are otherwise qualified by law to vote at any election by the people in any * * *

QUALIFICATION of
voters: certifi-
cate of citizen-
ship.

territory * * * shall be entitled and allowed to vote. * * * It is provided by section 2165 of the Revised Statutes of the United States how foreigners may become citizens. They must, if over twenty-one years of age, with one or two exceptions, make a preliminary statement of their intention to become citizens at least two years before being legally made citizens. The declaration of intention does not make a person a citizen; hence the senior Thomas and Andrew Miller were not citizens when they voted, and under the laws of this territory, their votes were illegal. The law further provides that all children under the age of twenty-one years, living in the United States when their parents became naturalized, are also made citizens by that act. But the elder Thomas was naturalized after the junior Thomas had reached his majority; hence, he is not saved by this proviso, and his vote was clearly illegal. It is contended for Wenzel that his services in the marine service from 1884 to 1887, together with his declaration of intention to become a citizen, makes of him a bona fide citizen. But

CITIZENSHIP: there are two serious objections to this
proof. contention: First, the certificate of his intention to become a citizen is the only proof receivable of that fact; and, second, admitting that the marine service, as testified to by him, is understood by

QUALIFICATION 'armies of the United States,' the pro-
of voters: sec- vision of the law in regard to such service
tion 2166 Revised Stat. U. S. con- is that any alien over the age of twenty-
strued. one who has enlisted and been honorably discharged, may become a citizen after one year's residence, without any previous declaration of intention to become a citizen. Section 2166, Rev. Stat. U. S. All the privilege given by such service is to do away with the declaration of intention, and residing five years in the country. Wenzel's vote was therefore illegal.

“It is alleged that one Simon Stonebarger voted for Junction City, and at the time was not a legal voter in San Juan county. By his own uncontradicted evidence he voted for Junction City, and he came into San Juan county to live upon September 3, 1890. The election was held upon November 4, 1890, so that he had only been a resident of the county two months. Section 1214, Compiled Laws, 1884, defines the ‘legal voter’ as a citizen of the United States, of the age of twenty-one years, who shall have resided in the territory six months, in the county in which he offers to vote three months, and in the precinct thirty days immediately preceding the election. In accordance with this, it is very clear that, at the time of voting, Mr. Stonebarger was not a legal voter of San Juan county. This concludes the evidence as to all illegal voting under the first head, except as to one Norris, whose case I shall consider, together with that of the defense, in regard to some alleged illegal votes of a like character.

“I now come to consider the evidence referring to those votes, which, it is alleged, were cast for Junction City because of undue influence and bribery. At the threshold of the inquiry we must definitely settle upon the character of evidence which is to be admitted to prove that the votes were cast, what place they were cast for, and why they were cast. It must be presumed, at first, that every vote was legally cast, and the complainant must prove, by a preponderance of credible testimony, that the votes which they attack as illegal are in fact so. A good deal of the evidence introduced to prove these facts is what, upon general principles of evidence, would be rejected as hearsay. But the complainants insist that, under the rule adopted by the weight of authority in this country, such evidence is admitted, and should be in this case. The question has never, I believe, been

PARTIES to record:
evidence.

passed upon in this jurisdiction, and hence should not now be thoughtlessly passed over. The well settled rules of evidence should not be changed or modified without some great necessity imperatively demanding it; neither should such rules be allowed to stand as a bulwark for wrong, when by a modification more good than wrong can be accomplished. There are two distinct lines of decisions upon this mooted question in this country. The question in its essence is, can the declarations of the voter, made upon election day or thereafter, as to where he voted, for whom, and as to his qualifications, be given in evidence in a proceeding not directly referring to his action? In the states of New York and Wisconsin, and in England, the question is answered in the affirmative. They place their decisions upon the ground that the voter is a party to the action, and hence that his declarations are always admissible. *People v. Pease*, 27 N. Y. 45; *State v. Olin*, 23 Wis. 319. In Kansas and Colorado the answer is emphatically in the negative. *Gilleland v. Schuyler*, 9 Kan. 569; *People v. Commissioners*, 7 Colo. 190.

“In the Kansas case, Judge BREWER, now upon the United States supreme bench, says: ‘That so much of this testimony as purports to give the statements of third parties, as to the number of times and the names under which they voted, is hearsay and incompetent, seems to us clear. * * * These declarations are not made at the polls by persons conducting the election, and so as to make part of the *res gestae*; nor do they accompany a principal fact which they seem to qualify or explain. * * * It may be said that the contest was between Lyndon and Burlingame, and that all persons supporting either were principals on one side or the other. But this is true no more in case of a contest between towns for the county seat than between individuals for an office. Surely, a

candidate for the office of governor would hardly feel that all who voted for him so far represented him that, in case of a contest, their admissions and statements could bind him on the question of fraudulent votes.' In Illinois the rule adopted by those states, upholding the legality of such evidence, has been modified so that the voter may be considered a party as against the contestant, and his declarations showing his want of qualifications to vote may be shown after first proving by evidence aliunde that he voted adversely to the contestant. *Beardstown v. Virginia*, 81 Ill. 541. In the case of *Cessna v. Myers*, a contest in the forty-second congress, the rule allowing this evidence, at least in the broad manner in which in England, and by the courts of New York and Wisconsin, it is sustained, is very intelligently criticised; and the text-writers would seem to doubt its correctness. *McCrary, Elec.* 448; *Paine, Elec.* 770, 773, 774. I am clearly of the opinion that the rule, as adopted by the English, New York, and Wisconsin courts, is wrong, and could be made the means of doing incalculable harm.

"But I can also see where illegal and fraudulent voting could fail of being proven, if such evidence was entirely excluded. While I think that probably Judge BREWER's statement as to the voter not being a party in a contest between individuals for an office may be correct, I do not give in my adhesion to his statement that he is not a party in a contest for the place for county seat. Who are the parties to this suit,—that is, the real parties whose interests are at stake? Are they the officers who are defendants, and who hold the offices? What difference does it make to their salary or their honor—all they have in the office—whether the county seat is at Junction City or at Aztec? Are the complainants the real parties in interest? Who are they? Simply property holders. Then is a county seat located for the benefit of property holders simply? If so, why,

then, are not all those who have property in the place parties to the action, whether upon the record or not? And, if they are, then all, at least, who had property in the place would be parties to the action, and their declarations would be admissible. If a county seat is not located for the property holders, and it certainly is not, who is it located for? Primarily for all in the county. But they may have different choices; so when they vote for different places, and there is a contest as to which place is chosen, all who vote for the different places must be parties as to that place. Hence in a contest only those who appear upon the record are parties to it, or all who vote for a place are. Take the case at bar. Supposing that all the officers who are made defendants were partisans of Aztec, and they should make declarations to the effect that they voted for Junction City and were bribed, while the fact was that they had not, yet the declarations would be admissible, though they have no interest in the case any more than any other citizens, but were made parties ex necessitate. The places themselves can not be parties, because they were not incorporated. But suppose they had been, and the town council of Aztec had begun this suit; would the declarations of the councilmen that they had voted illegally have been received? They could not have been received as declarations of a councilman as such, for he does not vote as a councilman, and hence can not make a declaration as a councilman. But he is a party to the suit, not as a voter, but as a councilman. How, then, can you logically introduce his declaration? The fact is that unless the voters who cast their votes for certain places are, in a contest, all parties, you have this anomaly; that a place may be prejudiced by the declarations of persons who in no sense represent it, while the same place may be further prejudiced by its inability to put in evidence the declarations of the nominal parties to the record,

yet who are not the real parties, as in the supposed case of the city council. It seems to me, then, that, in cases like the one at bar, all persons voting for a place are parties to an action between those places, so as to introduce their declarations as to their qualifications and motives in voting, after the fact of their voting for the place has been proven by evidence aliunde. I am satisfied that the rule adopted by the Illinois court is nearer the true rule. All evidence, therefore, upon this record which goes to show that a person said he voted for one or the other of the two places—Junction City or Aztec,—and that he was an illegal voter, or was bribed, will be excluded, unless there is competent evidence aliunde that the person did vote, and voted for the place alleged.

“I find then, that, under the second head of illegal voters charged by the complainants, the testimony shows that there were two classes of such voters: First. Those who testify themselves that they voted for Junction City, and that they received certificates for lots previous to casting their votes for that place. They also testify that they were not influenced in casting their votes by the reception of the certificates. Under this class I find the following who cast votes for Junction City: Juan de Jesus Valdez, Antonio Medina, J. P. Martin, Eleuterio Vigil, Doreteo Sanchez, Juan B. Valdez, J. Francisco Martinez. Second. Those who testify that they voted for Junction City, and received certificates for lots before so voting, but deny that their votes were influenced thereby, and concerning whom others testify as to their declarations that they were influenced in their voting by the gift of the certificate. Under this class I find the following who cast votes for Junction City: Joseph Guyer, J. Benito Larragoite, W. B. Firebaugh, Santiago Martinez, Frank Allen, Martin Pacheco, Felipe Gallegos, J. Nicanor Chavez, J. Maria Quintana. It should be said that all these

parties deny, in substance, that they ever made the declarations testified to.

“All the witnesses stand upon the record unimpeached, and their testimony must be taken as true, except where surrounding conditions are such, and the other facts, which must be believed, are of such potent force, as to irresistibly compel the mind to believe that the testimony is colored, biased, suppressive of part of the truth, or untrue. There was much agitation in the county for two months previous to the election, and for three or four months thereafter, and it is a safe conclusion from the evidence that voters who could talk, had talked a good deal about the election for county seat. Of the nine persons whom I have placed under the second class, the testimony shows positively, that seven of them declared, in the presence of from two to three others, that they had voted for Junction City for the gift of lots, or the certificates for lots. Each one of the seven denies these declarations. Who are to be believed? The parties who give the testimony as to the declarations are corroborated as to the voting, and for which place the vote was given, by the parties themselves. There is nothing improbable in the fact that they did vote because of the gift of lots, and there is not a scintilla of evidence that the persons testifying to the declarations were telling a falsehood or manufacturing testimony. Even admitting that these witnesses were all partisans of Aztec,—and it is not shown that they were,—there is not as great a presumption that they would deliberately commit perjury to accomplish their ends as there is that parties who have made a statement that might convict them of an illegal act would deny that statement to protect themselves. So that it in substance, comes to this: That two or more unimpeached witnesses testify to one state of facts, and one equally as good witness testifies to an opposite state of facts. I am bound to believe the two. I firmly

believe, upon the evidence, that seven of these voters made the declaration that they voted for Junction City for an inducement. Upon the other hand, upon the stand they peremptorily deny that they were so influenced. Hence it will be necessary to inquire into the testimony upon the question of bribery before finally passing upon the character of these votes. As to two of the voters in this class, only one witness testifies that they made declarations, which they deny. Upon general principles, this testimony would fail, and it will unless upon the whole proof the presumption in favor of it is made more positive.

“We now come to the crucial question in this case: Did the partisans of Junction City hold out inducements to the voters of San Juan county to vote in favor of their locality, and were these inducements in the nature of a bribe or undue influence, and did the voters above named receive the inducement as the moving cause of their voting for Junction City? If this question be resolved in the affirmative, then these votes must be deducted from the vote of Junction City. The testimony establishes the following facts beyond a doubt: That, up to two or three months before the date of the election, there was no such place in existence as Junction City, nor was there one contemplated. That about that time a company was organized which purchased land at that place, and platted it as a city, and gave a large square for county purposes. That the president, or at least the acting president, of the company was one L. W. Coe. This company, through its officers, made a proposition to the voters of San Juan county that, if they would locate the county seat at this place, where as yet no one resided, and the lots were not disposed of, they would bind themselves (and I believe they did so bind themselves) to build the necessary county buildings for the use of the county, and to con-

BRIBERY:
evidence.

struct suitable bridges across the San Juan and Animas rivers, which unite near this place and form a junction. Right here it must be said that this was a direct and unequivocal inducement to the voters to vote for Junction City, and shows that this was its purpose. I mention this as showing clearly that the members of the company at the inception of their undertaking were making inducements for votes, and as tending to characterize all their actions. Not that this inducement was illegal, for, while it was once thought to be so, the courts have decided that, as the individual voter received nothing perceptible, he was not bribed, and hence such offers were not illegal. The company, then, induced a number of persons to sign a manifesto, with themselves, to the voters of San Juan county, which was scattered abroad throughout the county, setting forth the advantages of Junction City, and almost at the opening saying: 'We are aware that it is every person's duty to vote for his own interest, as a matter of justice to himself, and for that reason we would ask you to join us in a consultation, to see if we can not convince you that it is to the best interest of every voter of the county to make this place the county seat.' Standing by itself, there is nothing wrong in the manifesto or in this excerpt taken from it. But it is noticeable that it is founded upon the interest of the voter. Now, a voter may have various reasons for voting for one place in preference to another, but those reasons are generally based upon interest. And the greatest interest a man can have in a place is a property interest. Anything which will enhance the value of that property, with little or no cost to himself, he is anxious for. Hence, if a person has lots in a town, and by voting a county seat there he can enhance the value of them, it is not only his pleasure to do so, but, from a business point of view, it is his duty to do so. About the beginning of October, 1890, or about

a month before the election, and after this manifesto was issued, the company began to issue the following certificates:

“October 6, 1890.

“This is to certify that I have this day sold to (here the name) lots numbers 21, 22, all in block number 17, in the town plat of Junction City, San Juan county, New Mexico.

“L. W. Coe,

“President of the Town Board of Junction City.

“Price, \$1.00 per lot.’

“The proof is clear and satisfactory that for these certificates the parties never paid anything. Coe testifies that they quit issuing certificates the day before the election. He also says that the parties were told that they must present their certificates on or before January 1, 1891, or they could not get deeds; and there were one or two who did present them after that time, and were refused. When they got their deeds they paid the one dollar per lot. The actual value of the lots was much higher. The testimony shows that the lots were assessed at \$10 each. Mr. Locke testifies that some of the lots sold as high as \$200. Others sold the certificates for prices ranging from \$3 a lot to \$12. If the evidence as to the value of the lots is good for anything, it is beyond doubt true that the one-dollar price was purely nominal, and so inadequate as to cast suspicion upon the whole transaction.

“Yet it is possible that the whole matter of the sale of the lots was a purely business transaction, entirely divorced from the question of the location of the county seat. Was it? I will consider a small portion of the testimony upon this point. Mr. Coe testifies: ‘Mr. Schreck had a long conversation with me in regard to the county seat, and conveyed the

idea to me that he was a Junction City man. Finally he asked me for a certificate. He asked me if it obligated him to vote for Junction City. I told him that it did not; that it was his privilege to vote for what he pleased; that we were selling these tickets to everybody; that we were going to build a town at Junction City, whether we got the county seat or not.' He further testifies that he kept no record of the certificates issued; and that he authorized one Laughren to say to the La Plata people that 'we were willing to sell lots at one dollar each, and all the people upon the La Plata who wanted lots in Junction City could have them at that price.' All the defendants' witnesses, upon the question of the sale of the lots, testify that there was no inducement for selling them at such a figure, and that they never asked anyone to vote for Junction City for the lots. This, it may be conceded, is established in their favor, as far as words go. But what do their acts say? Mr. Coe's testimony suggests a few inquiries to me, passing upon the facts as a juror. How does it happen that the gentleman who asked him for a certificate inquired if it obligated him to vote for Junction City? If nothing was said as to that, if it was a purely business transaction, how happens it that such a question should obtrude itself? Either one of three explanations must be vouchsafed—First, that they had been talking of his voting for Junction City for the lot; or, second, that the man Schreck was seeking to have a bid for his vote; or, third, that the transaction was so palpably wanting as to a consideration as that Schreck could conceive of no other reason. Mr. Coe's testimony makes a statement which is borne out by every word of testimony before me, and that is this: That the question of selling lots never came up, except in connection with the other question of voting for Junction City. It is insisted that this was to found a town simply, and had

no relation to the county-seat vote, yet by diligent search through the two hundred pages of testimony I fail to find one instance where a certificate was given that was not so given after or at the time of a conversation about voting for the county seat at Junction City. But Mr. Coe explains why he did not ask the parties to vote for Junction City for the lots,—‘because they were going to build a town there whether they got the county seat or not.’ Now, if this is so, how comes it that the certificates were limited as to time in which to obtain a deed? If it was a bona fide sale to found a town upon, what was the idea in limiting the time in which to get a deed? If the lot was sold, and for a valuable consideration, how could the company refuse a deed? How comes it that, if it was the idea to build a town in any emergency, the company did not give deeds at once? Why wait until after election? What was the object in issuing certificates up to election day, and then stopping? Why, unless there was some relation to that day, stop at that day rather than Christmas? Then, again, why did the company neglect to keep a record of the lots sold? It is noticeable that the price of the lots was placed after the signature of the president upon the certificate, and the certificate nowhere calls for a deed upon a consideration, and in any case there is nothing in the certificates which compels the grantee to take the lots. Yet it is contended that it was a pure business transaction, with the single purpose of disposing of lots in a place where there was to be a town in any emergency.

“But let us see how this contention is borne out by other testimony. A Mr. Laughren was an agent for Junction City, going about the country urging its claims. He was authorized by Mr. Coe to sell lots, by giving certificates, for the testimony is overwhelming that for the certificates nothing was given. One Joseph Sterret had testified that Laughren had offered him

four lots in Junction City to vote for it. Here is Laughren's testimony upon that point: 'I say that I never mentioned Junction City or lots to Joe Sterret in one way or the other. I knew that he belonged to the Aztec town board, and there was no need for me to offer him any inducements down here. That's the reason I didn't mention town lots to him at all.' This witness was evidently using 'inducements' to gain votes. Two others of the defendants' witnesses testify, —the one, that he was placing certificates to get the people interested in Junction City; the other, that Coe offered him certificates, saying that the lots would cost him nothing, but that he would have to pay one dollar a piece for making the documents, and that Coe sent a certificate by him to another voter, saying 'he wanted everybody in San Juan county interested in the Junction City town site;' while one of the complainants' witnesses testifies, and it is not denied, that Mr. Coe said, when giving certificates to certain parties, 'that they wanted men interested as much as possible, so that they would vote where their interest was.'

"That the price for the lot was merely nominal, in no manner representing its real worth, is too evident to admit of controversy. But it is very questionable from the evidence if that one dollar was ever intended to be for the lot. Mr. Locke made out the deeds under a contract with the company, and there is but very little evidence that the person who held the certificate paid for making the deed, while one of the defendants' own witnesses says that Coe told him that the one dollar was for making the documents. The evidence can point to but one of two conclusions,—either the giving of the certificates was a pure piece of business, or else it was done with the evident intention of influencing the voters to vote for Junction City. To hold to the first conclusion would be to declare that the town company lacked ordinary intelligence; to

refuse to believe the testimony of my senses; to say that the people of San Juan county are not governed by the motives which exist among other people. I am fully convinced that the certificates were given for the purpose of influencing votes; that it was intended as an inducement, just as much as the promise to build county buildings and bridges. The last is allowable, the first is legally wrong.

“Now, however, the question presents itself, were the persons whom the testimony shows received the certificates and lots, or the certificates only, guilty of receiving a bribe for their votes? ‘Where there is a gift of the same sum of money to a large number of persons after the election is over, the presumption will be that it was in consequence of an implied agreement or a corrupt expectation.’ 6 Am. and Eng. Encyclopedia of Law, 366. This presumption would hold in this case, if there was no other evidence but that the voters cast their votes for Junction City and received the lots. In other words, under the evidence, if these parties had not denied that they were influenced by the gift of the lots, a jury would be justified in concluding that their votes were purchased, and, therefore, illegal. But there is other evidence. Each witness comes on the stand, and denies that he was influenced by the gift of the lots, and that he had intended to have voted for Junction City any way.

“The defendants contend that the complainants must show that the gift was the cause of changing their vote from the way they had intended to vote before it is bribery; and, in any case, their direct testimony that they were not influenced by the gift is conclusive as to the matter. What is ‘bribery?’ ‘Bribery of a voter is the offering of a valuable consideration, either for his vote or for his forbearance to vote.’ 3 Am. and Eng. Encyclopedia of Law, 533. ‘It shall be unlawful * * * for any voter to take or receive

any bribe, compensation, money, article, or thing as an inducement to vote for any person or question. * * *

Section 4, ch. 135, Laws, 1889. I have shown that the giving of these lots, without a doubt, comes under these definitions. The lots were valuable, they were given to voters, and were intended to influence their votes. I do not think that the complainants have to affirmatively show that it changed the direction of the voter's vote. In the absence of contradictory evidence, upon a showing that the offer was illegal, and the acceptance, the jury may well presume that the taking was illegal. If this is not so, then bribery can not be proven, unless it is first proven that the person charged has said that he was going to vote another way. But under the law of this territory it must be an inducement to vote. It need not be the only inducement, or the principal one. If it enters into his reason for so voting, and was given as an inducement, the taking is illegal. The intention of the law in condemning bribery, or undue influence, is to see that the judgment and decision of the voter is absolutely unbiased by any illegal offers up to the moment of voting. Junction City and Aztec were entitled to have the unbiased judgment of the voter, uninfluenced by illegal considerations, up to the moment of voting. It may have been that all of these parties who took lots intended at first to vote for Junction City; but Aztec had the right to endeavor to change their decision by lawful arguments up to the time they deposited their votes. Now, if any party illegally offered them some inducement to vote for Junction City, which might operate to make the decision irrevocable, or make it harder for Aztec by lawful arguments to change that decision, and the parties took the unlawful inducement, then it is clear to me that their votes were illegal. In other words, that the law is not punishing for taking a bribe only when the direction of a vote is

changed, but for taking that which is intended as a bribe, and forestalls an unbiased judgment.

“But they all testify that the taking of lots was not an inducement, and that they were in no way influenced by it. I can not admit for a moment that this testimony is conclusive. To do so would be to say to every voter in this district: ‘The law holds that though you receive money, lands, or goods without an equivalent from those who desire your vote, and it is proven that the giver presented them with an unlawful purpose, and you voted as the person giving you the money desired, yet you can free yourself by simply swearing that you were not influenced thereby.’ This would be a dangerous holding. He who would take the goods would not hesitate to swear that he was not influenced thereby. I do not for a moment hold that their evidence is repudiated as worthless, only that it is not conclusive. But from the testimony I am convinced that they all must have known the purpose for which they were presented with the lots; that it, without a doubt, had its influence as an inducement in their voting for Junction City. At least, that the preponderance of testimony is in favor of the view that the taking of them was legally wrong under our statute, and that they should not be counted.

“I will now give attention to the case made by the defendants against the vote cast for Aztec. As I have already discussed the rules of evidence which I consider as binding, it will not require a very extended consideration of the evidence. The defendants contend that all the votes cast by members of the Largo Town Company for Aztec should be rejected as illegal, for the reason that they were purchased votes. The evidence substantially shows the following facts. That a place known as ‘Largo’ was at first intending to go into the contest for the county seat; that a number of its citizens asso-

BARGAIN for votes.

ciated themselves together for the purpose of advancing its interests; that this association was neither a copartnership nor a corporation, but simply a voluntary association; that it could neither keep the people of Largo from voting for their town, nor against it; that it could not in any way, but by persuasion, control the votes of the members so associated together; that the character of the association was such that it had no legal right to bind its members by the agency of any one or more; that before the election a committee from the Largo association met a committee of the Aztec Town Company or association, and submitted certain propositions to each other looking to the withdrawal of one of the places from the contest; the majority of the Largo representatives accepted the Aztec proposition; that proposition was to give the Largo association half the town lots in Aztec, a certain portion of a forty-acre lot, and pay them for a certain piece of land which they had purchased for county purposes in Largo, the consideration for this concession being that Largo was to withdraw from the contest. There is some testimony, not very positive, that the Largo people were to work for Aztec. I am of the opinion that the necessary inference from the bargain is that they were so to work and vote. There was to be no consideration of the trade unless Aztec was made the county seat. Unlike the giving of the lots or certificates, therefore, by the Junction City people, this was simply a promise, and, while I do not hesitate to say that it was an illegal promise,—a bribe, under our statute,—yet there must be proof that this bribe or offer was accepted by those who voted for Aztec before their votes can be declared illegal. If Aztec had been declared the county seat, and a certain number of men from Largo had received lots in Aztec, or they had formed a legal organization and accepted the lots and land and money, and they

had voted for Aztec, it would have been sufficient proof of a corrupt agreement to nullify their votes. But no one has received anything; the association was in no sense a legal organization, the acts of whose representatives could bind anyone but themselves, unless there was proof positive that the voter presumed to have been represented is proved to have directly authorized someone to act for him. There is no such proof. There is proof as to the members of the Largo association. The complainants admit that nine of the members voted for Aztec. Of those nine, four were at the joint meeting when the agreement was made with Aztec. There is no evidence that the other five were present, and authorized the committee to make the agreement, nor is there any evidence that they agreed to partake of any benefit from the Aztec proposition except the fact of voting. That is not sufficient. But as to the four who made the agreement, I am satisfied that they must be considered as voting for Aztec for the inducement held out by that place, and their votes declared illegal. The names of these voters are Simon Martinez, Enrique Manzanares, Crisostomo Dominguez, and Juan N. Jaquez.

“It would seem that the Aztec people were as vigorous in canvassing for their town as were they of Junction City, and used the same kind of arguments. They issued lots for the nominal consideration of one dollar. One Crouch testifies that he voted for Aztec, and received a lot the day before election as a gift. This vote should be counted off. One Charles Tinkerson had a lot given him after election, but promised him before that time by Mr. Koontz. While the testimony might make of this an innocent transaction, yet I can not, in view of the whole testimony, disabuse my mind of the conviction that it was given and received as an inducement for the vote, and is therefore illegal.

“It is alleged that A. B. Stacey, John S. Stacey, R. L. Dennison, George J. Smith, and C. B. Smith voted for Aztec, and at the time were not residents of the territory, or citizens (as to Smith).

QUALIFICATION
of voters: resi-
dence.

Under our law, a person must be a resident of the territory, county, and precinct for a certain time ‘immediately preceding the election.’ Now, the fact is that four of these persons were not, and if that statute (section 1214, Comp. Laws, 1884) means that, if a person is not in the territory, county, or precinct for all the days specified immediately preceding the election, his vote is illegal, then they should not be counted. But to hold that—to place such a construction on the statute—would outrage common sense. The people of San Juan county have their market for their produce in Durango, Colorado. It generally takes the farmers two or three days to go and return from this market. If, now, I should hold this statute to mean what it specifically states, a voter could not leave his precinct for a day to market his produce at any time within thirty days previous to the election without forfeiting his right to vote. These limits are simply limits to fix a bona fide residence. Now, residence is a fact depending upon outward acts and intention upon the part of the voter. McCrary, Elec., sec. 62.

“Now, from the voting, all of these parties above named are presumed to have been legal voters, and the testimony shows that they all had a residence where they voted sometime previous to their voting. Their voting is a fact going to show what their intention is as to their residence. It is incumbent upon the defendants to overcome the presumption in their favor, and by a preponderance of the legal testimony show that at the time the parties voted they were not residents of the places where they voted. The law certainly is that a voter may have a residence in one place and business in another, and

that he should vote at his residence. This applies to those especially who are not in a fixed business, such as cowboys. And, when once a residence is established, it is presumed to remain until proven to have been changed; and he who attacks the vote must prove the change. Now, in the case of Dennison, it is fully proven that he had a residence at Knickerbocker's, where he voted, and that he was a cowboy. The evidence to overcome this is simply his being out of the territory with a camping outfit. There is nothing tending to show where he had acquired another residence. If this man's vote was illegal, then that of R. G. Norris, upon his own showing, was equally so, and should be deducted from Junction City's vote. I do not believe that either is illegal. John S. Stacey was a resident of San Juan county. He went to Colorado to work for the alliance of San Juan county. He voted at Aztec, which shows his intention. There is nothing in his occupation which overcomes this intention. But, admitting that he was not a resident, the only proof that he voted for Aztec is that of someone whom he told. This I have held is incompetent. It is true that it is proven that all the votes but one cast at Aztec precinct were for Aztec, but as there is no proof who cast the one vote for Junction City, I can not say that this voter did not. A. B. Stacey was a married man. He removed his family to Colorado, where he rented a farm and cultivated it. It seems to me that he shows here his intention to change his residence. It is true there is no direct testimony as to which place he voted for, but, if I presume that the other Stacey voted for Junction City, then it is clear that this one must have voted for Aztec. His vote was illegal. As to George J. Smith, it is sufficient to say that he must have voted for Aztec. It is proven aliunde. He himself stated to Mr. Spence that he was a foreigner, and that he

QUALIFICATION of
voters: change
of residence.

never had his second papers. This testimony is admissible after the proof of the voting and for which place. His vote was illegal. As to C. B. Sharp, I am convinced by the testimony that his vote was illegal. The testimony to that effect was not contradicted. That he voted for Aztec is inevitable, under the testimony.

“These are all the illegal votes which I have been able to say have been proven upon either side by the legal testimony before me. There has been much testimony from witnesses that persons have told them that they had voted for such a place, and that they voted for money or lots. There was testimony showing that some voters voted for Junction City, they themselves swearing that they had, and that they had received lots. But there was other evidence showing that their interests were all in that neighborhood, and that they were working for that point as its active partisans; and it may well be that the lots were given them for their services in working for the place, as there seems to be no reason for bidding for their votes. While there was an activity on both sides in favor of the respective places, which resulted in making illegal offers in holding out illegal inducements, I have failed to find any such widespread acceptance of bribery among the voters at any polling precinct as requires me to hold that the election was in toto illegal.

“I find the following facts: (1) That upon November 4, 1890, there was an election held in San Juan county, New Mexico, for the location of a county seat. (2) That said election was held in accordance with chapter 7, Laws, 1889. (3) That, at said election, there was cast five hundred and two votes, of which Junction City received two hundred and fifty-five Aztec two hundred and forty-six votes, Farmington, one vote. (4) That the board of county canvassers declared Junction City chosen as the county seat by a

majority of nine votes over its nearest competitor, Aztec. (5) That from the two hundred and fifty-five votes cast for Junction City there should be deducted, as illegal, twenty-three votes; leaving, as legal votes cast in favor of Junction City, two hundred and thirty-two. (6) That from the two hundred and forty-six votes cast for Aztec there should be deducted, as illegal votes, nine votes; leaving, as legal votes cast in favor of Aztec, two hundred and thirty-seven. (7) That of the legal votes cast, the place known as 'Aztec' received a majority of five votes over Junction City.

"As a legal conclusion, I find that the place known as 'Aztec' having received a majority of five votes over its next nearest competitor, is the legally elected county seat of San Juan county. As both parties, as shown by the testimony, were using means to gain their ends, which were not legal, the costs will be divided as in the decree set out. Judgment will be given for the complainants."

OPINION OF THE COURT.

FREEMAN, J.—There is no error in this record, and the decree will be affirmed. The facts are as follows: On November 4, 1890, there was an election held in San Juan county, for the purpose of locating a county site. The principal competitors were Aztec and Junction City. The friends of both places resorted to every possible means to procure votes for their respective choice. The district judge, sitting as a chancellor, found that persons had been allowed to vote who were not legally qualified, and also that a large number had been induced to vote in the one way or the other by presents in the shape of town lots. The number of persons so induced to vote, and the means by which the improper influences were brought to bear, as set

out in detail in a very carefully prepared opinion of the trial judge, whose findings of fact, and whose application of the law thereto, are, in our opinion, in the main correct, and are here given in the language of the judge.

O'BRIEN, C. J., and LEE and McFIE, JJ., concur.

[No. 506. August 24, 1892.]

ANTONIO CORTESY, PLAINTIFF IN ERROR, v. TERRITORY OF NEW MEXICO, DEFENDANT
IN ERROR.

SELLING LIQUORS ON SUNDAY—PENAL STATUTES, CONSTRUCTION OF.—Chapter 26, Laws, 1887, amending section 933, among other things, by omitting the words "selling * * * or liquors, or any other property," and imposing the penalty on anyone found on Sunday "engaged in any labor, except works of necessity, charity, or mercy," did not restrict the ordinary meaning of the words "engaged in any labor," and any person selling liquors on Sunday is engaged in "labor," within the meaning of the amendatory act.

ERROR, from an order overruling a motion in arrest of judgment against defendant for selling liquor on Sunday, to the Fifth Judicial District Court, Socorro County. Judgment affirmed; O'BRIEN, C. J., dissenting.

SUMMERS BURKHART and NEILL B. FIELD for plaintiff in error.

In the construction of statutes the intention of the legislature must prevail, and where it is plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that intention into effect, even though contrary to the letter. Endlich on Interpretation of Stats., sec. 295, and cases cited; Potter's Dwarris on Stats. & Const. 179; Suth. Stat. Con., secs. 218, 240, 246, and cases cited. Sedg. Con. Stat., p. 194; 1 Kent,

462; *Noble v. State*, 1 Greene (Iowa), 325; *Somerset v. Dighton*, 12 Mass. 383; 4 Sawy. 302, 317; *Reiche v. Smythe*, 13 Wall. 162; *Smythe v. Fiske*, 23 Id. 380; *Smith v. People*, 47 N. Y. 330.

The meaning of general words in a statute must be restricted whenever necessary to carry out the legislative intention. *Reiche v. Smythe*, 13 Wall. 162.

To ascertain the legislative intent, all statutes in *pari materia* are to be construed together as though they constituted one act. Sedg. Con. Stat., pp. 209-212, and note (a); Suth. Stat. Con., sec. 283, and cases cited; Endlich on Int. Stats., sec. 43, and cases cited; *United States v. Freeman*, 3 How. 556.

For that purpose, repealed statutes are in *pari materia*, and are to be considered, especially when expressly referred to in the act to be construed. Endlich, Int. Stat., secs. 48, 49, 50, and cases cited; *Ham v. Board of Police*, 142 Mass. 90.

When part of an act has been repealed, although of no operative force, it must still be considered in construing the rest. Endlich, Int. Stat., secs. 49, 50, and cases cited; *Ex parte Crow Dog*, 109 U. S. 556; *Bank v. Collector*, 3 Wall. 495.

Where acts are in *pari materia*, if the same word is used in both, a distinction made in one is a legislative exposition of the sense in which it is to be understood in the other. Potter's Dwarris, 191; *Reiche v. Smythe*, 13 Wall. 162; *Robbins v. R. R. Co.*, 32 Cal. 472.

Where two acts are in *pari materia*, it will be presumed, if the same word be used in both and a special meaning given it in the first, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention. Potter's Dwarris, 191; *Reiche v. Smythe*, 13 Wall. 162.

A word used in an amendatory statute is presumed

to be used in the same sense as in the statute amended. *Robbins v. R. R. Co.*, 32 Cal. 472.

When two words or expressions are coupled together, one of which generically includes the other, the more general term is used in a meaning excluding the specific one. *Endlich*, Int. Stat., sec. 396, and cases cited; *Suth. Stat. Con.*, sec. 266, and cases cited; *Reiche v. Smythe*, 13 Wall. 162.

When a section, expressly amendatory of another section of a statute, purports to set out in full all it is intended to contain, any matter which was in the original section, but is not in the amendatory statute, is repealed, by the omission. *Endlich*, Int. Stat., sec. 196, and cases cited; *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Id. 127; *Brietung v. Lindauer*, 31 Mich. 217.

An amendment repeals all of the section not embraced in the amended form. *Suth. Stat. Con.*, sec. 133, and cases cited; *Endlich*, Int. Stat., sec. 196, and cases cited; *Wakefield v. Phelps*, 37 N.H. 295.

When a statute is revised or one act framed from another, some parts being omitted, the omitted parts are not to be revived by construction, but must be considered as annulled. *Ellis v. Paige*, 1 Pick. 45.

EDWARD L. BARTLETT, solicitor general, for the territory.

If the act of 1887 has any force at all, it must be construed with section 933, *Compiled Laws*, in so far as it is not contradicting; where it is, it fails. *Postmaster General v. Early*, 12 Wheat. 147.

Whether a statute is repealed, is a matter for judicial construction, not of legislative statement. *United States v. Clafin*, 97 U. S. 549.

The intent of the statute governs, but that intent must be discovered in the statute itself. *Suth. Stat. Con.*, sec. 234, 237-239, and cases cited.

The title of the act may sometimes be resorted to as an aid in ascertaining the legislative intent. *Wilson v. Spaulding*, 19 Fed. Rep. 304.

In considering the intent it is permitted to consider the mischief to be removed or the necessity which induced the enactment. *Suth. Stat. Con.*, sec. 292, and cases cited; *People v. Sweetzer*, 1 Dak. 295-301.

The act of 1887 and section 933, *Compiled Laws*, can both stand together. *Suth. Stat. Con.*, secs. 147, 132, 143, 101.

As to arrest of judgment, see 12 *Am. & Eng. Encyclopedia of Law*, p. 147 B., and cases cited; 1 *Bish. Crim. Proc.*, sec. 1282.

As to what constitutes the record, see *U. S. v. Barnhart*, 17 Fed. Rep. 581; *Warren v. Flagg*, 2 Pick. (Mass.) 448; *Bouv. Law Dict.*, title "Record;" *Black Law Dict.*, title "Record;" 1 *Bish. Crim. Proc.*, secs. 1341-1347.

The writ of error only reaches errors apparent on the face of the record; it may be employed where the error is in the indictment, the verdict, sentence, or any other part of the record. 1 *Bish. Crim. Proc.*, sec. 1368.

"The supreme court shall examine the record—and on the facts therein contained, alone, shall award a new trial, reverse or affirm the judgment." *Compiled Laws*, sec. 2190; *Laws*, 1889, pp. 3, 4.

The plea in abatement, motion to quash, or demurrer should have been made before arraignment to make the record complete. 4 *Am. & Eng. Encyclopedia Law*, p. 764.

SEEDS, J.—The plaintiff in error was indicted under chapter 26, *Laws*, 1887, for violating the Sunday law. He pleaded guilty, and then filed a motion in arrest of judgment, alleging (1) that the indictment in this case charges no public offense against the laws of the territory; (2) that it is not an offense against the

laws of this territory to buy or sell goods, wares, or merchandise, chattels, or liquors, or any other kind of property, on the first day of the week, called "Sunday." The motion was overruled, and he was fined, whereupon he prosecuted his appeal to this court. In a few words, the question involved in this appeal is, is there

any law in this territory against the selling of goods, wares, and merchandise, including liquors, upon the first day of the week, called "Sunday?" The indictment in its charging part reads: "On the said eighth day of May, A. D. 1892, being the first day of the week, called 'Sunday,' did * * * unlawfully engaged in the labor of selling wine, beer, liquor, and merchandise, said labor being neither the works of necessity, charity, nor mercy, contrary to the form of the statutes made and provided, and against the peace and dignity of the territory of New Mexico." The law under which the indictment is found reads as follows: Chapter 26, Laws, 1887: "Section 1. That section nine hundred and thirty-three of the Revised Statutes of the year 1884 be, and the same hereby is, amended to read as follows: Any person or persons who shall be found on the first day of the week, called 'Sunday,' engaged in any sports, or in horse racing, cock fighting, or in any other manner disturbing any worshiping assembly, or private family, or attending any public meeting or public exhibition, excepting for religious worship or instruction, or engaged in any labor, except works of necessity, charity, or mercy, shall be punished by a fine not exceeding fifteen dollars, nor less than five dollars, or imprisonment in the county jail of not more than fifteen days, nor less than five days, in the discretion of the court, upon conviction before any district court." It is quite apparent that, unless a forced construction is given to the words, that is, unless they are much narrowed from their common acceptation, the words "engaged in any labor" fully cover the

SELLING liquors
on Sunday:
penal statutes,
construction of.

charge in this indictment. Counsel for plaintiff freely admit this. But they contend that this law is an amendment of section 933 of the Compiled Laws, and when read in connection with it, that it becomes at once evident that the words are narrowed, and that the words used in the charging portion were in section 933, and are left out of the law now in force; hence the intent of the legislature to eliminate these words, and narrow the words "any labor," is unquestionable, and this court must so declare. It will be necessary to set out section 933 in full to understand the contention perfectly. It is as follows: "Sec. 933. Any person or persons, who shall be found on the first day of the week, called 'Sunday,' engaged in any 'games' or sports, or in horse racing, cock fighting, 'dancing,' or in any other manner disturbing any worshiping assembly, or private family, 'or in buying or selling any goods, wares, or merchandise, chattels, or liquors, or any other kind of property,' or in holding or attending any public meeting, or public exhibition, except for religious worship or instruction; or engaged in any labor, except works of necessity, charity, or mercy; 'or who shall keep open any store, shop, or office, or other place of business, or place for the display of goods, wares, or merchandise,' shall be punished by a fine not exceeding fifty dollars, nor less than ten dollars, for the first offense, and for the second or any subsequent offense by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment of not less than five nor more than twenty days, in the discretion of the court or justice, upon conviction before any district court or justice of the peace; provided, that none of the provisions of this act shall be construed to prevent travelers from prosecuting their journey, and keepers of ferry boats, livery stables, hotels, and restaurants, from accommodating travelers, or from supplying their wants, or to prevent the proprietors of

hotels or restaurants from supplying the wants of their boarders or lodgers, on said day; barbers may also pursue their vocation; and provided, further, that butchers and bakers may keep their establishments open, and sell meat, bread, and like articles, but shall not sell liquors, or general merchandise, and apothecaries may likewise keep open their places of business, and sell and deliver drugs or medicines and surgical instruments and medical apparatus, but no other articles, on said day.”

The present statute is exactly like section 933, excepting in those portions quoted, in the amount of the fines and the proviso. The proviso is entirely left out in the law under consideration. Now, the plaintiff in error insists that, by omitting from the present statute the words “games or,” “dancing,” “or in buying or selling any goods, wares, or merchandise, chattels, or liquors, or any other kind of property, or in holding or,” and “or who shall keep open any store, shop, or office, or other place of business, or place for the display of goods, wares, or merchandise,” it is evident that the legislature intended to exempt from punishment all who engaged in games, dancing, selling liquors, or other merchandise upon Sunday. That is, while the words, “any person or persons who shall be found on the first day of the week, called ‘Sunday,’ engaged in any labor,” are clear, explicit, and unambiguous—are so plain that a man of ordinary intelligence can not err as to their meaning; yet, as in the original section 933 there followed after those words the other words, “or who shall keep open any store, shop, or office, or other place of business, or place for the display of goods, wares, and merchandise,” and there was omitted the other clause, “or in buying or selling any goods, wares, or merchandise, chattels, or liquors, or any other kind of property,” it is equally as clear and explicit that the legislature intended to exempt those

acts from the penalty of the statute. So that now, in this territory, the stores and other places of business for the display or selling of any goods, wares, and merchandise, and liquors, may be kept open upon Sunday the same as upon other days, but the farmer must not lift a hoe or pull a weed. The gambler may run his den of infamy and vice under the protection of law, but if a father and his children should engage in some innocent sport, in the neighborhood of a religious gathering, he and they would be amenable to the penalty of this act. If any person, by engaging in sports, horse racing, cock fighting, or in any other manner, excepting games or dancing, disturb any worshiping assembly or private family, it is unlawful; but, upon the contention of the learned counsel for the plaintiff, if any person, by running a gambling house or a dance house disturb a religious gathering or private family, the law is powerless to act. More, if their contention is correct, then while it would be generally true that the disturbing of a religious gathering or private family in any manner whatever would be illegal upon any day, yet under their insistence it must be believed that the legislature, by passing the latter statute, intended, by omitting the words "games" and "dancing" from its enumeration of those things which should not be done upon Sunday to the disturbance of worshiping assemblies and private families, now the dance houses and gaming dens may do what heretofore was illegal. And this, it is insisted, is true liberty, and escaping from the imbecility of sumptuary regulations!

The question raised is one of legislative intention. As a general proposition, the law is that, where there is no uncertainty or ambiguity in the language of the law, the intention of the lawmakers is to be arrived at by the language used. Endl. Interp. Stat., secs. 4-6; Suth. Stat. Con., sec. 237. Under this rule of law, there could be no difficulty, for plainly, and by admis-

sion of counsel, the selling of liquors would be comprehended in the words "engaging in any labor." But the statute under consideration is an amendment to a section of the Compiled Laws, and it is to be presumed that the legislature had a purpose in amending the law, and hence both the present statute and the one amended must be considered together in arriving at the legislative intent, upon the assumption that there is a necessity for construction in order to arrive at that intent. *Suth. Stat. Con.*, secs. 133, 283, 286. It is contended that as the words "any labor" are used in both statutes, and that in the first, or section 933, the words "or in buying or selling any goods, wares, or merchandise, chattels, or liquors, or any other kind of property," are also used, it must be held that the words "any labor" do not embrace the acts included in the latter clause; that the words "any labor," therefore, have a specific and limited meaning, which do not include the latter clause. Hence, when the words "any labor" are used in the present statute, it is with the same meaning as in section 933, which excludes the clause in regard to selling liquors, and, that clause not being in the later statute, it must be supposed that those acts covered by it are excluded from the intention of the statute. It must be conceded at once that, were there no other canons of construction admissible in such a case as this, the contention of the plaintiff in error would be unanswerable. Where two acts are in *pari materia*, it will be presumed, if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention. *Reiche v. Smythe*, 13 Wall. 162. .

This case fully sustains the principle for which the plaintiff in error is contending. The question presents itself, though, is this the only principle which is to be invoked here? And, if it should transpire that the

invoking of this principle would lead to palpable absurdities, convict the legislature of imbecility, hoist upon this territory a law which would be as "unsubstantial as a dream," "a delusion and a snare," and would announce to the world that the people of this territory had turned in contempt from the teachings of the ages and the legislation of every commonwealth in this nation, must it not cause us to pause and consider if there are not other principles which might be applicable, which would not lead to such results? We freely admit that if, under known canons of construction, we can not arrive at any other conclusion than that the legislature of this territory, at its twenty-seventh session, intended to practically wipe out the Sunday law and annihilate it as a civil rest day; that it intended to say to the farmer, the drayman, the carpenter, "If you water the roses or turn the glebe, if you draw a box of goods upon the highway, or if you lift a hammer in toil, you must suffer fine or imprisonment," while to the saloon keeper, the gambler, the bawdyhouse inmates, and the lepers of society generally it says, "You may ply your business unmolested and under our benediction and protection,"—then we will say so; for it is not our province to legislate for our people, nor by a strained construction to uphold the good name and reputation of a coordinate branch of this government. But we do not see that we are under any such necessity. There are rules for arriving at legislative intent which must first be taken into consideration before dealing with the one so strenuously contended for by counsel for plaintiff in error. It is a cardinal rule of construction that, when the language of the statute is plain and unambiguous, that then interpretation is needless. Suth. Stat. Con., sec. 234. If, then, we should adopt this rule for our guide in the case before us, there would no room for construction. The acts complained of were labor, and they were per-

formed on Sunday; hence the intention of the legislature is too plain to be misunderstood.

But it is urged that it is a penal statute, and should be strictly construed; no persons or acts ought to be brought within the terms of the statute who or which by a strict construction can be left out. Upon this point we quote the following from the supreme court of the United States as timely and wise: "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended." *U. S. v. Hartwell*, 6 Wall. 385, 395. The rule which requires courts to so construe statutes as to avoid absurdities and mischievous consequences, when the language does not imperatively require such construction, is not only well settled by adjudication, but is the emphatic expression of common sense. *Suth. Stat. Con.*, sec. 238. Endlich, the English author, expresses this rule of presumption with great emphasis, thus: "The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the pre-

sumption against unreason, inconvenience, or injustice." Endl. Interp. Stat., sec. 264. When, then, a statute is, upon its face, plain, reasonable, just, and in strict accordance with the best thought and enlightenment of the age, ought a court to go back to another statute in *pari materia*, and read into the existing law a sense which will make of it, not by presumption simply, but in fact, an absurdity, an injustice, an unreasonable and farcical law, a law that flies in the face of enlightenment, morality, decency, and the very spirit, not alone of the age, but of the common law? We think not. But do these consequences follow the contention of the learned counsel for plaintiff in error? We think that they do. Already we have outlined some of the absurd consequences, not only absurd, but, when fully considered, appalling. Look at them again. Keep in mind the contention that words in section 933 have received a definite meaning which, when used in a similar statute afterward, and not modified, must have the same construction as in the amended section. So, when the statute says that no religious gathering or private family shall be disturbed by certain acts "or in any other manner," the latter words do not contain the specific acts enumerated; and hence when the statute under consideration leaves out the words "games" and "dancing," the legislative intent is that private families and religious gatherings may be disturbed by those means, and there is no redress, although they may very reasonably be considered as comprehended in the words, "or in any other manner."

Under this contention it would be possible to keep open any place of business for the display of, or the buying or selling of, goods, wares, merchandise, chattels, liquors, or any other kind of property; but it would be a crime to open the doors of a manufacturing establishment, to operate a mine or a railroad, to attend to

agricultural labor. In short, about everything which could by any means be considered disreputable, demoralizing, and dangerous to good government and morals would be legalized by this contention, while about everything that has in it nothing inherently wrong would be condemned by legal inhibitions. But this is not all. In the argument the learned counsel did not consider the principle invoked in its bearing upon the absence of the proviso from the present law. If their contention is correct in principle, and should be invoked in this case to ascertain the legislative intent, then that principle ought to be the touchstone by which to ascertain that intent as to the whole law. Now, if certain words, clauses, or phrases in section 933 are qualified by other words, clauses, or phrases, and in the law under consideration the qualifying terms are dropped, it is clear that the legislature intended to dispense with the effect of the qualifying terms. We then have this state of affairs: that upon Sunday it is illegal for travelers to prosecute journeys; for keepers of ferry boats, livery stables, hotels, and restaurants to accommodate travelers or to supply their wants; it is illegal for butchers or bakers to keep their establishments open to sell meat, bread, or like articles, but it is perfectly legal for them to keep their establishments open to sell liquors or general merchandise. Apothecaries must now close, unless they wish to dispense liquors. It will be observed, then, that by giving the present law the construction contended for by plaintiff in error, there arises a series of absurdities and mischievous consequences which outrage all ideas of common sense, and fix upon a coordinate branch of this government the stigma of intending this outrage, which intention does not appear from the language of the law itself. But this contention is not condemned alone by this view of the case. It will not be declared by the courts that the legislature intended a law to have

a construction which strikes at fundamental principles of government,—at those principles which are back of all written enactments, and upon which Anglo-Saxon and Latin civilization alike is based. This law was originally declared to be “An act to provide for the proper observance of the Sabbath,” and the amending body of the act can not deprive the act of that intention, unless clearly so intended. If we place upon it the construction asked for, then this act should be named “An act for the desecration of the Sabbath.” Whatever may be individual opinions as to the question of religion, and the particular form of it known as “Christianity,” yet the legal fact must be recognized by every one that this nation, and every portion thereof, is nominally Christian. *Rector, etc., of Holy Trinity Church v. U. S.*, 12 Sup. Ct. Rep. 511.

As a Christian nation, it has always been the policy of the legislatures to protect the sanctity of the Sabbath; to pass appropriate laws for the proper observance of the Sabbath; and, unless the law is so specific as to demand a construction against such view, it would be a rash court that would give its adhesion to such a construction. It must also be considered in this connection that the whole trend of modern thought, feeling, and legislation is toward the curtailing of the admitted evils of the liquor traffic. There is not a commonwealth in this great nation but has passed restrictive legislation upon the liquor traffic. The nation itself has supplemented the legislation of the states wherever its laws might nullify those of the states. All, or nearly all, of the supreme courts of the states, and the supreme court of the United States, have condemned the unrestricted traffic of liquor in vigorous terms. The nations of England, Germany, France, and Sweden have been forced to appoint commissions to take into consideration the deleterious effects of the traffic upon their people, and to pass laws for the purpose of cur-

tailing its evil consequences. Now all this may be wrong and mistaken. It may be sumptuary legislation, and to be condemned. It may be the evidence of retrogression instead of progression. It may be all this, and more. With the abstract view we have no occasion here to take issue. For us it is enough that, without a dissenting voice, the civilized world has and is condemning the unrestrained traffic in liquors, and yet, with this fact before us, and the other fact, equally as evident, that the nation and this territory are Christian, and called upon to pay a decent respect to the Sabbath, we are called upon to place a construction upon an act, ostensibly passed for the protection of the Sabbath, and which in its language plainly asserts that very idea, which will, in effect, break down the Sabbath, and also throw open the day to the unrestrained evils of the liquor traffic. There is not a canon of statutory construction in the books which ever contemplated such an outrage upon common sense. It must be constantly kept in mind that under the very first canon of construction there is really nothing to construe, for the words of the statute are plain and free from ambiguity. That it is only when we are asked to read the law in the light of another statute that the confusion becomes worse confounded, and that the law bristles with absurdities, and runs counter to the great fundamental principles of the government, and in the very teeth of the supposed spirit of the age. Why did the legislature change the law? Clearly to make it more definite and certain, and to reduce the penalties, that it might the more readily be enforced. The very terms of the original statute, with its proviso, were so uncertain and susceptible of so many refined distinctions, that it was clearly in the interest of the law to curtail the language, and bring it into harmony with the laws of other states on the subject. "Every change of phraseology, however, does not indicate a change of substance and intent.

The change may be made to express more clearly the same intent, or merely to improve the diction." Suth. Stat. Const., sec. 256.

LEE and McFIE, JJ., concur.

O'BRIEN, C. J. (dissenting).—Notwithstanding the foregoing vigorous argument of the court, redolent with the fervent eloquence of of my brother SEEDS, I reluctantly dissent from the conclusions reached. What induced the twenty-seventh session of the legislative assembly of New Mexico to remove the safeguards thrown around the Christian Sabbath by a preexisting law of the territory, is not the question submitted. Has it done so, is the only point that the court is called upon to determine in this case. Its power is not denied. Its right to do so we may dispute as moralists, but can not settle as a court, when the intent is obvious. *Potuit, voluit, fecit*. The word labor in the amendatory act, when considered in connection with the section amended, means nothing more or less than manual, servile labor. It would be sheer nonsense to call a saloon keeper or merchant a laborer or laboring man. It is much safer to permit the legislature to outrage the religious spirit of the age and country for a short period than to nullify its act by a forced judicial construction violative of every canon of statutory interpretation.

In my opinion, the judgment in obedience to the clearly expressed will of the legislature ought to be reversed.

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2. **ID.—CROSS-EXAMINATION—EVIDENCE.**—In such case, where the witness in behalf of plaintiff testified that defendant wrote to him several letters in which defendant expressed the wish to have his name stricken from the contract, the court below erred in not permitting the witness to be cross-examined as to the reason given in the letters, if any, for such wish.
3. **ID.—IMPEACHMENT OF WITNESS—EVIDENCE.**—Where it is desired to contradict a witness by letters written by him, before they can be admitted in evidence, a proper foundation must be laid for their admission, by calling the witness' attention to those parts of them which are to be used for that purpose, under section 2084, Compiled Laws, 1884.
4. **ID.—RATIFICATION OF AGENT'S ACTS—INSTRUCTIONS—EVIDENCE.**—Where the defendant testified that he knew of the alleged contract, but did not know that his name had been signed to it, an instruction that if the jury found that defendant had knowledge of such contract, and of plaintiff's performance of his part of it, and acquiesced in such contract, and in the conduct of his alleged agent thereunder, "he ratified the same, and is bound thereby, even if there was lack of authority to its original execution," was misleading and erroneous.—*Kirchner v. Laughlin*, 300.

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CONTRACT FOR SALE OF LAND.

1. **CONTRACT FOR SALE OF LAND—ASSUMPSIT—RESCISSION.**—On the rescission of a contract, under seal, for the sale of land, an action of assumpsit will lie to recover the purchase money paid under the contract, and the contract, though under seal, is admissible in evidence, in such action, to show what was paid upon it before its rescission, and when and how paid.
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3. **ID.—FRAUDULENT REPRESENTATIONS—MERGER—DAMAGES.**—Where, in such case, it was contended by defendant that the alleged fraudulent representations were merged in the contract, and that if there were any damages, by reason of the same, the plaintiff must assert his right to such damages in an action upon the contract, and not by an independent action like that pursued for the recovery of the purchase money, the contention was not well founded, the contract sued on being an executory contract to sell and to execute a warranty at a future day, and not a contract by deed executed with covenant of absolute warranty for breach of which an action might be maintained for damages.
4. **ID.—RESCISSION—RENT—RULE IN STATU QUO.**—Where, in such case, it was further contended by defendant that, though the representations made may have been false, plaintiff could not sustain the action, there having been no rescission of the contract as a matter of law, the plaintiff and vendee not having placed the vendor in statu quo, plaintiff being in default in the payment of part of the rent, and it appeared that at the time of the inception of the contract the defendant and vendor had merely the possession of the property, that the vendee on the rescission of the contract vacated the premises and returned or offered to return the keys to the vendor, and that the vendor had received and had the money of the vendee paid on the contract representing fully the rental value of the premises, under such circumstances the vendee placed the vendor in statu quo by returning to him merely what had been received from him—the possession of the premises; the title having been in the vendee, who, as the rightful owner, was alone entitled to the rental value.
5. **ID.—TRUST DEED, ACCEPTANCE OF BY TRUSTEE—EVIDENCE.**—Where it appeared in evidence, in such case, that at one time the title to the premises was in another, and such other person made a deed to the property, creating a trust providing for the trustee's acceptance by signing the deed, but he never signed it, the occupation of the premises so conveyed and the possession of the deed by the trustee were sufficient to show his acceptance.
6. **ID.—TRUST DEED WITHOUT WORDS OF INHERITANCE—EVIDENCE—PRESUMPTION.**—Where it further appeared from the deed in evidence, in such case, that it contained no words of inheritance, it did not convey a fee; and it will not be presumed, in the absence of any evidence to show that the creation of a fee was necessary to sustain the purposes of the trust, that such an estate was contemplated.

CONTRACT FOR SALE OF LAND. Continued.

7. **ID.—LOST DEED—ADMISSIBILITY OF PROOF OF CONTENTS.**—Evidence of the contents of a deed alleged to have been lost is not admissible, where it is denied that such instrument ever existed, unless it be shown by the party offering such evidence that he has used the utmost diligence to find and produce the original; the very existence of the instrument itself being in question, ordinary diligence would not be sufficient.
8. **ID.—FAILURE OF TITLE—CLAIM OF ADVERSE POSSESSION.**—Where a person alleges title to land under a lost deed, which he fails to establish, he will not be permitted to set up a defense of adverse possession for a period sufficient to fix the title in himself.
9. **ID.—TRIAL—INTERLINEATION OF INSTRUCTIONS.**—Where, on the trial of a cause, instructions given are interlined, no error will be presumed where none is shown affirmatively, the statute forbidding such interlineations being directory merely, and not mandatory.—*Daly v. Bernstein*, 380.

CONTRACT OF SALE.

1. **CONTRACT OF SALE—RESCISSION—INSTRUCTIONS—EVIDENCE.**—In an action of assumpsit for goods sold and delivered, on an order by mail, where it was a disputed question of fact whether the goods were of the kind ordered, and the jury found that they were, the defendant could not complain of an instruction that, "if a person orders goods, and he receives the goods he has ordered, if he does not wish to accept them it is his duty to return them immediately to the party from whom he ordered them; and if he retains them without any order direct from the sender to that effect, he would become liable for them, and, if they were burned up while in his possession, he would be responsible for them," etc. If an order for goods is sent by mail, and the order is strictly complied with by the party on whom it is made, the contract is complete in law, and the party ordering has no right to return the goods without payment; and, if they are destroyed by fire while in his possession, he is equally bound.
2. **ID.—VERIFIED ACCOUNT, SUFFICIENCY OF—EVIDENCE—VERDICT.**—Where, in such a case, the plaintiffs introduced a verified account of the claim set out in the declaration, this was sufficient to establish *prima facie* every material averment thereof (sec. 1878, Comp. Laws, 1884); and a verdict of the jury, upon the question whether the evidence offered by defendant was sufficient to overcome the *prima facie* case thus established, will not be disturbed, in the absence of any substantial errors of law.—*Cerf & Co. v. Badaraco*, 214.

CORPORATIONS.

1. **CORPORATIONS—SUBSCRIPTION—BILL IN EQUITY—MASTER'S REPORT—EXCEPTIONS.**—In a suit, by bill in chancery, to subject certain stock subscribed to defendant company to the payment of an execution issued on a judgment against the company, on a return of *nulla bona*, where the case was referred to a master to take proof and report with his findings thereon, the chancellor, on exceptions made to the master's report, did not err in refusing to give any weight to the findings of the master, but was justified in considering the testimony as though it had been originally heard by himself.

CORPORATIONS. Continued.

2. **ID.—FINDINGS OF CHANCELLOR—EVIDENCE.**—In such case the findings of the chancellor will not be reversed, unless clearly opposed to the evidence.
3. **ID.—ISSUE OF STOCK—FRAUD—EVIDENCE—AMENDMENT.**—Where a certain amount of stock was issued, by the directors of a corporation, for a certain sum of money and certain lots of real estate, and the stock so issued was to be taken as fully paid up, and it was contended that the money and lots together were not equal in value to the stock, and that the issuing of the stock as fully paid up was a fraud upon the creditors of the corporation; but there was a diversity of opinion as to the value of the lots, and the testimony did not show such a discrepancy between the value of the lots and the value of the stock as to raise the presumption of fraud in law, and there was no testimony to show fraud in fact, the chancellor did not err in refusing to allow complainant to amend his complaint after the case had been passed upon by the master, even had the request been made in time, a point upon which the court does not pass, as unnecessary to decide.
4. **ID.—SUBSCRIPTION—STOCKHOLDER.**—Where a person was granted the privilege of subscribing to the stock of a corporation by conforming to certain preliminary requirements, and absolutely refused to take the stock, though one of the incorporators and vice-president of the corporation, he was not in fact a stockholder.—*Medler v. Hotel & O. H. Co.*, 331.
5. **CORPORATIONS, FOREIGN—USURY—LIABILITY FOR ACTS OF RESIDENT AGENT.**—An agent of a foreign corporation, loaning money under a contract with the corporation, providing that, "all commissions on loans by the company, and all bonuses or penalties payable by borrowers from them in respect of such loans, shall belong to the company," will be presumed to be acting for the company in receiving commissions on loans in excess of the highest rate of interest allowed by law, where the company has knowledge of each step taken by him in such negotiation, although the agent has received exclusive benefit of the commission (*Fowler v. Equitable Life Ins. Co.*, 12 Sup. Ct. Rep. 1); and the fact that such company was not aware that the transaction was usurious and unlawful, under the law of the territory, will not protect it.—*Lloyd v. Scott*, 4 Pet. 105.
6. **ID.—USURY—FORFEITURE.**—Where, in such case, an action was brought, under sections 1737, 1738, Compiled Laws, to recover double the amount of the commission or bonus alleged to have been charged and received in excess of the lawful rate of interest prescribed by the statute,—Held: That the better rule is to treat the usurious transaction as valid to the extent of the principal sum and legal interest, and apply all payments made thereon, whether such payments were received as usury, or as a bonus, or commission in reduction of the principal and legal interest; and that such action will not lie until the principal and interest of the loan have been paid.—*Scottish Mortgage & Loan Inv. Co. v. McBroom*, 573.

COUNTY BONDS IN AID OF RAILROADS.

1. **COUNTY BONDS IN AID OF RAILROADS—SUIT ON INTEREST COUPONS—ASSUMPSIT—EXECUTION BY BOARD—SIGNATURE OF PROBATE JUDGE—VALIDITY OF ISSUE.**—In an action of assumpsit to recover the

COUNTY BONDS IN AID OF RAILROADS. Continued.

amount of overdue interest coupons on bonds of the county of Santa Fe, issued under the act of February 1, 1872, authorizing the counties of the territory to issue bonds in aid of railroads, where the bonds to which the coupons were attached were executed by the board of county commissioners after the passage of the "County Commissioners' Act" of 1876, authorizing and empowering the board to execute bonds issued under the act of 1872, supra, it was the act of the county in its corporate capacity, and the signature of the probate judge thereto was unnecessary, and did not affect the validity of the issue.

2. ID.—RATE OF INTEREST, LEGALITY OF.—Where the qualified electors of a county have fixed the rate of interest on bonds issued under the act of February 1, 1872, in aid of railroads, as provided in the second section thereof, at seven per cent, such rate so fixed is valid, especially in view of the passage of another act at the same session of the legislature abolishing usury. Chap. 19, Laws, 1872.
3. ID.—LIMITATION—SEC. 1863, COMP. LAWS, 1884.—Where, as in the case at bar, an action is founded on written instruments, the four years' statute of limitation does not apply. Sec. 1863, Comp. Laws.
4. ID.—LIMITATION—SEC. 1862, COMPILED LAWS, 1884—STIPULATION—RESOLUTION OF BOARD AUTHORIZING LOAN TO PAY INTEREST.—Nor will the six years' statute of limitation (sec. 1862, Comp. Laws), apply to those coupons which matured in 1881, it having been stipulated that taxes were levied for their payment, and the board of county commissioners having recognized the interest due as a continuing liability, before the six years could attach, by the passage of a resolution, at its regular session of June 7, 1886, authorizing such loan to be made as might be necessary to meet this interest at maturity, which was a formal official recognition of the bonds, as well as an admission of the obligation to pay the interest due on the bonds, and was provable, both as an acknowledgment and as an account stated, under the common counts; and if enough of the interest money, so levied by taxation, was misappropriated, to have paid these coupons, and the conversion occurred more than six years before the action, the defendant should have shown that fact.
5. ID.—STIPULATION BY ATTORNEYS AMENDATORY OF PLEADINGS.—In such case, a stipulation by the attorneys that "the pleadings, bill of particulars, and other proceedings, shall be deemed and considered as hereby amended so as to embrace the plaintiff's claim on coupons clipped from the bonds aforesaid, to the amount of \$19,915 * * * as well as the plaintiff's claim already specified in the papers on file herein, and also to conform to the facts as to the form and recitals," etc., was valid, and on a recovery, judgment was properly entered for the amount therein stipulated.
6. ID.—INTEREST COUPONS, ADMISSIBILITY OF—EVIDENCE.—In a suit on interest coupons, where there was no plea denying under oath the execution of the coupons, they were admissible in evidence under the common money counts, without any further proof of their execution. Sec. 1878, Comp. Laws, 1884.
7. ID.—BONA FIDE HOLDER—BURDEN OF PROOF—EVIDENCE.—Where bonds were issued within the scope of a lawful power, and their recitals import the performance of all the conditions precedent, any irregularities in the exercise of the power, while they might, perhaps, have avoided the bonds as between the county and the railroad, are

COUNTY BONDS IN AID OF RAILROADS. Continued.

not available as a defense against a subsequent bona fide holder. In such case, it was incumbent on the county to show affirmatively that such holder had knowledge of the irregularities in order to avoid the securities.

8. ID.—NEGOTIABILITY OF, IN HANDS OF BONA FIDE HOLDER.—Where such bonds stated on their face the purpose for which they were issued, and that purpose was a lawful one, and the recitals showed a compliance with the law, they became negotiable securities, unimpeachable in the hands of bona fide holders, except for want of jurisdiction in the board of county commissioners.
9. ID.—STIPULATION—PRESUMPTION.—Where, in such case, it was stipulated that a certain bond “number 45” was one of the bonds from which the coupons were detached, “the said bonds being issued in several series, and all of them in form, tenor, and recitals substantially like the said bond number 45,” such stipulation did not imply that the bonds of the several series were of the same date, nor that they matured at the same time. The presumption is they were legally issued, and that, therefore, the different series were made to mature in different years, in order to be within the terms of section 1 of the act of 1872, providing that “the amount of bonds or other evidences of debt that may become due in any year shall not exceed two per centum of the assessed value of the property of the county at the time of issuing such bonds or other evidences of debt.”
10. ID.—ASSESSMENT—EVIDENCE.—A book purporting to be the assessor’s register of assessments for the year 1879, offered in evidence, containing erasures, interpolations, and alterations, and not certified as required by law, was invalid, and incompetent to prove a valid assessment, such as would bind a bona fide purchaser for value of negotiable securities by constructive notice, nor was it conclusive of value, the county commissioners having the power to alter it, either by increasing or diminishing.
11. ID.—NEGOTIABLE INSTRUMENTS PAYABLE TO BEARER—PRESUMPTION. Where county bonds, regular on their face, and payable to bearer, were floated for value, and the interest coupons were produced and admitted in evidence, in a suit to recover the interest due thereon, it was a prima facie presumption that the plaintiff was a holder of the coupons for value.
12. CONSTITUTIONALITY OF ACT FEBRUARY 1, 1872—BONA FIDE HOLDER—ESTOPPEL.—The legislature had the power to pass the act of February 1, 1872, authorizing the counties of the territory to issue bonds in aid of railroads, and conferring upon the counties and their officers the power to pass upon all the facts and conditions preliminary to the execution of such bonds, and where a bond, duly executed by a county, recites that it “is issued in full conformity to, and in compliance with, the statutes of the territory of New Mexico, empowering and authorizing counties to issue bonds to assist in the construction of railroads passing through all or any portion of said county,” and has passed into the hands of a bona fide purchaser for value, the county is estopped from denying the validity of the bond on the ground of an overissue.—*Coler v. County Commissioners of Santa Fe Co.*, 88.

COUNTY SEAT. See ELECTION CONTEST, 1.

COURTS. See CRIMINAL LAW, 2, FOR GENERAL JURISDICTION; CRIMINAL LAW, 5, FOR DISCRETIONARY POWER OF; CRIMINAL LAW, 40, SPECIAL TERM OF DISTRICT COURT.

CRIMINAL LAW.

1. **CRIMINAL LAW—APPEAL—RECOGNIZANCE—SUIT FOR BREACH—DECLARATION—PLEADING.**—In a suit for breach of a recognizance, a declaration, which fails to allege that the defendant in the recognizance was ever called into court, or that any default was ever entered therein against him and the recognizance forfeited by judicial order, is fatally defective.—*Brooks v. United States*, 72.
2. **CRIMINAL LAW—COURTS OF GENERAL JURISDICTION, JUDGMENTS OF—TRIAL—PRESUMPTION—EXCEPTIONS—APPEAL.**—On appeal from the final judgment of a court of general jurisdiction, all the details of the trial are presumed to be legal and sufficient, until the contrary is shown. *Territory v. Webb*, 2 N. M. 147; *Territory v. Yarberry*, Id. 458. This court has also repeatedly held that error claimed upon the trial, to which no exception was taken at the time, will not be reviewed on appeal. *Territory v. O'Donnel*, 4 N. M. (Gil.) 196; *Territory v. Baker*, Id. 238.
3. **ID.—IMPANELING OF JURY—VALIDITY OF ACT OF FEBRUARY 26, 1889, —EXCEPTIONS**—The act of February 26, 1889 (Session Laws, 1889, p. 227) providing for the impaneling of grand and petit juries to investigate and try causes on the part of the United States, is not special legislation. It is the same as contemplated by the organic act, and the same as has been in operation since the organization of the territory. Nor is the act special legislation so far as the district is concerned, since it provides the same kind and class of juries for every district in the territory.
4. **ID.—PERJURY—INSTRUCTION.**—On a trial for perjury a request for an instruction that, "If the jury believe that the witness, Margerito Barela, testified truly, but that the marriage to which she testified was not a legal marriage, they will find the defendant not guilty of perjury in swearing that she was not married" presented a question of law to be submitted to the jury, and was properly refused.
5. **ID.—NEW TRIAL—DISCRETIONARY POWER OF COURT.**—A motion for a new trial is a matter in the discretion of the trial court, whose action is not assignable as error, on appeal, unless the court has committed reversible error to which exceptions were taken at the time.—*Coleman v. Bell*, 4 N. M. (Gil.) 27.
6. **ID.—INSTRUCTIONS.**—Where the instructions given present the issues fairly to the jury, and either party is dissatisfied with them on any point presented, he should offer a proper instruction covering that point.—*Territory v. O'Donnel*, 4 N. M. (Gil.) 196.
7. **ID.—PERJURY—ADMISSIBILITY OF ADMISSIONS OF DEFENDANT—EVIDENCE.**—On a trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage are admissible. But such evidence is to be received with caution, and should always be submitted to the jury under proper instructions from the court.
8. **ID.—MARRIAGE CEREMONY, ADMISSIBILITY OF ORAL TESTIMONY TO PROVE—PRESUMPTION—EVIDENCE.**—A marriage ceremony may be proved by any competent witness present at the ceremony; and, when proven, the contract, the capacity of the parties, and the validity of the marriage will be presumed. *Wilkie v. Collins*, 48 Miss. 496.—*United States v. DeAmandor*, 173.
9. **CRIMINAL LAW—ASSAULT AND BATTERY—APPEAL FROM JUSTICE'S COURT TO DISTRICT COURT—TRIAL DE NOVO.**—The right of appeal in criminal cases from a justice's court to the district court is given by

CRIMINAL LAW. Continued.

section 2414, Compiled Laws, 1884; and when such appeal is perfected the cause is then within the jurisdiction of the district court to be disposed of, by trial de novo, as other criminal cases there pending. Sections 2390, 2395, of the Compiled Laws, 1884, and rule 16 of the district court, which provide that in all cases of appeal from a justice's court, when the cause is regularly called on the docket, the plaintiff may, at his election, have the appeal dismissed, or the judgment below affirmed, apply only to civil causes, and the district court has no power to render judgment upon the sentence of a justice's court in a prosecution for assault and battery, but must try the case de novo.—Territory v. Lowitski, 235.

10. CRIMINAL LAW—GRAND JURY—VALIDITY OF ACT OF FEBRUARY 26, 1889—SPECIAL LEGISLATION.—Held: The act of February 26, 1889 (Session Laws, 1889, p. 227), providing for the summoning and impaneling of grand juries, in so far as it attempts to regulate the trial of offenses against the territory, by enacting that the jury drawn from the several counties composing the judicial districts shall alone have authority to make presentments of all crimes committed against the territory in the county in which the court is held, and requiring the votes of twelve grand jurors to find an indictment in Santa Fe county, and of only nine grand jurors to find an indictment for the same offense in other counties composing the judicial district, is in plain contravention of the act of congress, approved July 30, 1886, providing that no local or special law shall be enacted by the legislature of any territory for summoning and impaneling grand or petit juries, and void to that extent.—Territory v. Baca, 420.
11. CRIMINAL LAW—MURDER—CHALLENGE TO ARRAY OF JURY—APPEAL.—On appeal, in a prosecution for murder, submitted on the record, a challenge to the array of the jury must be in writing, and state specifically the ground of the challenge; otherwise an objection to the array appearing in the record will not be considered.
12. ID.—ERRORS—BILL OF EXCEPTIONS.—Nor will alleged errors in rulings on evidence be considered, on appeal, in such case, where there is no bill of exceptions.—Territory v. Davis, 452.
13. CRIMINAL LAW—LARCENY—CATTLE BRAND—EVIDENCE OF OWNERSHIP.—In a prosecution, on indictment, for larceny of an animal, it may be alleged and proven that another than he in whose name the brand was recorded was the owner of the brand or the animal at the time of the larceny. Under section 57, Compiled Laws, a brand is prima facie evidence, not of the ownership of the person in whose name it is recorded, but of the ownership of the person "whose brand it may be;" the statute contemplating a possible change of ownership of such brand after record. If the brand was recorded, it is still prima facie evidence of the ownership of the true owner at the time of the larceny; and evidence offered to prove who was the "true owner" is not subject to the objection that it was proving ownership of the brand by parol evidence.
14. REASONABLE DOUBT—INSTRUCTIONS.—An instruction, in such case, that "the presumption of law is that the defendants are innocent, and this presumption continues with them until it is overcome by evidence, beyond a reasonable doubt, that they are guilty as charged," and that "a reasonable doubt is not a mere possibility of a doubt, but it must be a reasonable doubt growing out of all the evidence and circumstances in evidence in the case," was a sufficient instruction as to what a "reasonable doubt" is, and without prejudice to defendants.—Chavez v. Territory, 455.

CRIMINAL LAW. Continued.

15. **CRIMINAL LAW—MURDER—EVIDENCE—VERDICT.**—In a prosecution on indictment, for murder in the first degree, where the only evidence offered for the defense was the testimony of the accused, which was contradictory and evasive, and the evidence for the prosecution was such that the jury could not escape the conclusion, beyond a reasonable doubt, of the guilt of the defendant, unless they refused to believe the testimony of the witnesses for the territory, they were justified, as the judges of the credibility of the witnesses, in returning a verdict of conviction.
16. **ID.—CONTINUANCE—SECTION 2051, COMPILED LAWS, 1884.**—A motion for a continuance, made on the thirteenth day of the term, on the ground that it was not made earlier, because the defendant "hoped to obtain the necessary testimony," stated a conclusion and not a fact such as contemplated by section 2051, Compiled Laws, requiring such motions to be made on the second day of the term, and, if after that day of the term, that they shall state facts constituting an excuse for such delay.
17. **ID.—CONTINUANCE — AFFIDAVIT — SECTION 2049, COMPILED LAWS, 1884.**—A motion for a continuance, alleging that defendant had been unable to obtain testimony to show that he was nearly all his life unbalanced; that he had been in three different insane asylums; that he had been unable to learn the address of his relatives in order to secure their assistance in obtaining a copy of the records of the asylums showing he had been confined there; that such testimony was necessary to show that affiant was wholly insane and irresponsible for his acts, and that he was unable to go to trial without the testimony of the wardens of such asylums, who would testify to the fact of his insanity,—was not sufficient: First. Because it was not shown wherein the copies of the records of such asylums would be legally competent. Second. Because the statement as to the other testimony was not such a statement of facts as could legally go to the jury, and which the prosecution could admit. Third. Because the affiant did not allege facts to show that he was insane at the time of the commission of the crime. Fourth. Because no facts were alleged as to defendant's insanity, to which the wardens of such asylums could testify, as required by section 2049, Compiled Laws.
18. **ID.—COMPULSORY PROCESS FOR ATTENDANCE OF WITNESSES—PRESUMPTION.**—Where it does not appear from the record that defendant asked for compulsory process to compel the attendance of witnesses, it will not be presumed that such process was refused.
19. **ID.—MURDER—INSTRUCTIONS—SECTION 2054, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.**—Section 2054, Compiled Laws, making it the duty of the trial judge in all cases to instruct the jury as to the law of the case, does not require the court to give instructions as to murder in the second and third degrees where the evidence only shows murder in the first degree. The statute refers solely to the case as made by the evidence.
20. **ID.—MURDER—PLEA, INSANITY—BURDEN OF PROOF.**—On a prosecution for murder, where the defense was insanity, the burden of proof was on defendant to introduce sufficient evidence to at least produce in the minds of the jury a reasonable doubt as to his sanity and guilt.
21. **ID.—MURDER—REASONABLE DOUBT—INSTRUCTIONS.**—An instruction in such a case, that the law does not require the jury to be satisfied

CRIMINAL LAW. Continued.

beyond a reasonable doubt, of each link in the chain of circumstances relied on to establish defendant's guilt, that it was sufficient to warrant such conviction if the jury, taking the testimony altogether, were satisfied beyond a reasonable doubt that defendant was guilty, was a proper instruction, under the evidence and not misleading.

22. **ID.—TESTIMONY OF DEFENDANT—INSTRUCTIONS.**—Nor was it error for the court to instruct the jury, in such case, where the defendant testified in his own behalf, that they might take into consideration defendant's special interest in the case, in determining what weight should be given his testimony.
23. **ID.—IMPEACHMENT OF WITNESS—INSTRUCTIONS.**—In such case, a charge to the jury that one of the modes of impeaching a witness was to show that the witness had, at other times and places, made different statements from those made on the witness stand, and that if they believed the witness had done so, as to any material matter, it was their exclusive province to determine to what extent such fact tended to impeach his memory or credibility, or detracted from the weight which might otherwise be given to his testimony, was also a proper charge, and without prejudice to defendant.—*Territory v. Romine*, 2 N. M. 114.
24. **ID.—NEWLY DISCOVERED EVIDENCE—NEW TRIAL.**—On a motion for new trial on the ground of newly discovered testimony, where the testimony, if it had been produced, would only have tended to contradict the witness, and his testimony might have been dispensed with, and still have left sufficient to justify the verdict, the court did not err in refusing to grant the application.—*Faulkner v. Territory*, 464.
25. **CRIMINAL LAW—RAPE—EVIDENCE—INSTRUCTIONS.**—On a prosecution, on indictment for rape, under section 1, chapter 24, Laws, 1887, where there was no evidence tending to show that the prosecutrix "through idiocy, imbecility, or unsoundness of mind, either temporary or permanent," was incapable of giving consent, it was not error for the court in its charge to read all of said section to the jury, where the court afterward fully explained to the jury the law governing the commission of the crime defined in the section, since it does not embrace several distinct offenses, but merely defines the different means by which the same offense may be committed.
26. **ID.—EVIDENCE—INSTRUCTIONS.**—On such prosecution, where the evidence was that the defendant had importuned the prosecutrix, a girl of fifteen years of age, to drink wine shortly before the offense was committed, and that she became dizzy from the effects of it, the court properly submitted to the jury the question whether the deed was accomplished by producing stupor, and did not err in charging them upon the degree of stupor necessary for the prosecution to prove to warrant conviction.
27. **ID.—INDICTMENT—EVIDENCE—INSTRUCTIONS.**—Where, on such prosecution, neither count of the indictment contained any charge of threats, but the first count distinctly charged that the defendant violently and feloniously made an assault upon the prosecutrix, "and against her will, and by forcibly overpowering her resistance, feloniously did ravish and carnally know," and the prosecutrix testified that the crime was accomplished by threats of personal injury if she did not yield, and the use of force, an instruction that if the jury believed

CRIMINAL LAW. Continued.

from the evidence beyond a reasonable doubt that the defendant did carnally know the prosecutrix, although she did not make the utmost resistance of which she was capable, they might find defendant guilty, provided they believed beyond a reasonable doubt that the defendant threatened to use force and do her great bodily harm if she did not yield, and that she did yield through fear defendant would do her such injury, was not prejudicial to defendant.

28. **ID.—INSTRUCTIONS, WHEN NOT PREJUDICIAL ERROR.**—On a prosecution for rape, a defendant who admits the fact of criminal intimacy with the prosecutrix can not complain of an instruction that it contains an imperfect statement of what is necessary to constitute such intimacy.
29. **ID.—EVIDENCE—CORROBORATION—INSTRUCTIONS.**—On such prosecution, where it was in evidence that the prosecutrix told her mother of the commission of the deed soon after its occurrence, it was not error for the court to instruct the jury that such fact was a corroborating circumstance, tending to sustain the truth of her statements.
30. **ID.—INSTRUCTION, NOT PREJUDICIAL, WHEN.**—An instruction, in such case, that, if the jury believed from the evidence, the prosecutrix made no outcry, at the time the offense was alleged to have been committed, and made no complaint of the offense to others, but concealed it for a considerable time thereafter, they should take this circumstance into account, with all the other evidence, in determining the question of the guilt or innocence of the accused, was not prejudicial to defendant, especially not where the defendant himself introduced evidence to show that the prosecutrix was a girl whose character for chastity was not above suspicion.
31. **ID.—INSTRUCTIONS, WHEN PROPERLY REFUSED.**—Instructions embodying the same idea as those previously given by the court may be properly refused.
32. **ID.—CONFLICT OF TESTIMONY—VERDICT.**—On a prosecution for rape, where there is a direct conflict between the testimony of the prosecutrix and of defendant as to whether the act of criminal intimacy, admitted by defendant, was committed by force and against her will or not, the verdict of the jury will not be disturbed.
33. **ID.—VERDICT, IRREGULARITY OF, WILL NOT BE SET ASIDE FOR, WHEN.**—Where it appeared on such trial that, after the jury had retired for deliberation and had reached a verdict, one of the jurors withdrew from the jury room into the court room and had an officer write out the verdict, dictated in substance by the juror, who returned with it to the jury room, and a copy of the same was returned into court, signed by the foreman, as the verdict of the jury, and it was not contended and did not appear that the form so prepared had anything to do with the jury's deliberations, or that the defendant's rights were prejudiced thereby, though it was an irregularity highly censurable, the verdict will not be set aside.—*Territory v. Edie*, 555.
34. **CRIMINAL LAW—PERJURY—INDICTMENT—PROOF—VARIANCE.**—On a prosecution, on indictment, for perjury, where the indictment alleged that defendant, in making proof of a preemption claim, falsely swore that he had made "actual settlement" on the land on or about the first day of February, 1886, and that he "had built a house" and "resided on said land continuously until the first day of September, 1886," and the only evidence offered in support of the indictment was the deposition of defendant, taken to prove up his claim, from

CRIMINAL LAW. Continued.

which it appeared he had testified that he made settlement on the land "about the first day of February, 1886;" and that, in answer to the question, "Has your residence thereon since been continuous?" he testified, "Sometimes I had to make money to improve my place," and no mention was made of a house in the deposition; to the admission of which testimony defendant objected on the ground of a variance, which was overruled,—Held: There was a material variance between the allegations and the proof offered to sustain them, and the court below erred in permitting the deposition to go to the jury.—*Wohlgemuth v. United States*, 568.

35. **CRIMINAL LAW—EXCLUSION OF WITNESSES FROM COURT ROOM—ADMISSION OF TESTIMONY AT CLOSE OF EXAMINATION.**—In a prosecution for assault with intent to kill, where, at the opening of the case, the witnesses were sworn and put under the rule of exclusion from the court room, the defendant, at the close of the testimony, called and offered to examine witnesses who had not been subpoenaed, sworn, or placed under the rule, without showing that such testimony was material, or without giving any reason for not complying with the order of the court placing witnesses under the rule, the court properly refused to permit the examination of such witnesses.—*Trujillo v. Territory*, 589.
36. **CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—SUFFICIENCY OF INDICTMENT.**—In a prosecution, on indictment, for assault with intent to commit murder, the indictment must state the manner and means of the assault so far, at least, as to show that the crime would have been murder had not the acts involved in the facts pleaded stopped short of their full effect.—*Territory v. Carrera*, 593.
37. **CRIMINAL LAW—MURDER—APPEAL, MOTION TO DISMISS.**—On a motion to dismiss an appeal from a conviction of murder, on the grounds that the appellant had failed to file a transcript of the record in the cause within ten days before the first day of the term of the court to which it was returnable, though appellant filed the record with the clerk on the first day of the term; and that it was a common law action, and should have been brought by writ of error—Held: In cases where the appeal does not operate as a stay of proceedings, the transcript is not made out and forwarded to the appellate court unless on the application of the appellant. But in cases, as in the case at bar, where the appeal does operate as a stay of the proceedings, it is the duty of the district clerk, under section 2476, Compiled Laws, without any application on the part of appellant, to file with the clerk of the supreme court a transcript of the record without delay; and his failure to do so will not subject the appellant to a dismissal of his appeal. Neither section 2189, Compiled Laws, nor the act of 1891, in relation to appeals in equity cases and writs of error in common law cases, has any application to appeals in criminal cases.
38. **ID.—VENUE, PROOF OF.**—It is not necessary in a trial for murder that the venue be affirmatively proven, it is sufficient if the evidence incidentally given in connection with the facts in the case shows that the venue was properly laid, as in this case, where it appears from the evidence that the person alleged to have been murdered died in the county where the venue was laid. *Comp. Laws*, sec. 2460; *State v. Dent*, 3 Am. Crim. Rep. 421.
39. **ID.—MOTION FOR NEW TRIAL, REQUISITES OF—EXCEPTIONS—WAIVER.** A new trial will not be granted, in such case, on the ground that the interpretation of the testimony and the argument of the counsel

CRIMINAL LAW. Continued.

were incorrect, and prejudicial to defendant, and that at the time no exception was taken, because neither the defendant nor his counsel were aware of such incorrect interpretation, where the motion fails to set out the exact words of the witness and counsel, and the exact words used by the interpreter in interpreting them in the language in which they were so interpreted, so that the court below, or the appellate court, may pass intelligently upon the question to determine whether such interpretation was erroneous or not. In such case an objection is not sufficient; an exception must be taken; and a failure to except is a waiver of the objection.

40. **ID.—MOTION IN ARREST OF JUDGMENT—SPECIAL TERM.**—In view of section 552a, Compiled Laws, providing that, “when, in the discretion of the judge of any district court, a furtherance of justice may require it, a special term of the district court may be called,” etc., and section 553, Compiled Laws, providing that, “Any special term of the district court that may be ordered under the provisions of this act shall be held for the purpose of hearing all causes that may be depending in said court, both civil and criminal,” etc., a motion in arrest of judgment, on the ground that the term of the court at which the defendant was tried and convicted was a special term, and unauthorized by law, and the proceedings of the term *coram non judice*, will not be sustained.
41. **ID.—CONFLICT OF TESTIMONY.**—On appeal in a cause the appellate court will not weigh the evidence where there is a direct conflict.—*Territory v. Hicks*, 596.

CROSS-EXAMINATION. See **CONTRACTS**, 2.

DAMAGES.

1. **DAMAGES—TROVER—PLEA, GENERAL ISSUE—EVIDENCE.**—In an action of trover for damages for an alleged conversion of certain cattle, where the defendant pleaded the general issue, and the evidence was: That three years before, plaintiff received, in accordance with and executory contract with certain parties for the purchase of the same, four hundred head of cattle to be of a certain grade and quality; that he accepted one hundred and eighteen, and put his brand upon them, but rejected the remainder, because not of the required grade; put them in a new brand not his own; turned them loose upon the common range with other cattle of the vendors, and other parties; and notified the vendors, by mail, of his action in the matter, who paid no attention to his letter; that there was no further contract or arrangement between them; that two years afterward defendant purchased from the vendors all their cattle, excepting those rejected by plaintiff, and shipped a portion of the latter, without objection from plaintiff, who was at the time in defendant's employ, and asserted no claim to the cattle or their price until a year thereafter, when he found he had been charged with the price of them by the original vendors three years before, and testified that he thought they had sold them to certain other parties, who subsequently transferred them to defendant. Held: The evidence was not sufficient to show that the plaintiff was the owner of the cattle at the time of the alleged conversion, and therefore he had no right of recovery.
2. **ID.—RECORDED BRAND—EVIDENCE—INSTRUCTION.**—An instruction that a recorded brand is one of the modes of proving ownership, by brand, of property in this territory, and that when an animal is found

DAMAGES. Continued.

bearing such brand, the jury may find, from that proof alone, that the animal belongs to the owner of the brand, was misleading, having assumed that the record of the brand had been proved, where the only evidence on that point was plaintiff's testimony that he did not know whether the brand had been recorded or not.

3. **ID.—TITLE—INSTRUCTIONS.**—An instruction that a verdict and judgment for plaintiff would operate to transfer his title to the cattle to defendant was clearly erroneous. An unsatisfied judgment in trover does not pass the property. It is a mere assessment of damages, on payment of which the property vests in the defendant. *Benj. on Sales*, p. 54, sec. 49.—*Pryor v. Portsmouth Cattle Co.*, 44.
4. **DAMAGES—DECEIT—SUFFICIENCY OF DECLARATION—ESTOPPEL.**—In an action of trespass on the case for damages for deceit, where the declaration alleged, that, at the time of the grievances complained of defendants were engaged in organizing a community of "Faith-its;" that by deceit and fraudulent representations that its property would be held in common and the community conducted on principles of brotherly love and morality, plaintiff was induced to join with defendants, and consecrate his life, labor, and all his effects and prospects, together with those of his two children; that defendants knew at the time of making such false representations that the property would not be held in common by the community, but that the title thereto was then and would in future vest in one of the defendants, and that the community would not be conducted on principles of kindness and equity; that one of the defendants was guilty of acts of tyranny and immorality; and that plaintiff remained a member of said community from October, 1884, to April 1886, working for the community, and defendants refused to pay him for his labor, whereby plaintiff suffered great damage in his loss of time, labor, mental anguish, humiliation, etc., and the proof was that plaintiff was a man of ordinary intelligence, and himself joined lustily in the exercises and services of song of the aforesaid community, when the ode to "Shalam" was sung in the temple of "Tae" to the "tune of Dixie,"—Held: The declaration does not state a proper cause of action; and, if it did, the allegations and proof would present a clear case of estoppel in "Tae." The court can not give its assent to the view of the counsel for appellee that the ode to "Shalam" sung to the "tune of Dixie" was of itself such an act of disloyalty as to entitle the plaintiff to a verdict.—*Ellis v. Newbrough*, 181.
5. **DAMAGES—NEGLIGENCE—TRESPASS.**—In a suit for damages against a railroad company for injuries received, by the plaintiff being struck and thrown from the track by its engine and train of cars, through the alleged negligence of its servants, where the evidence was that at the time of the accident the plaintiff was walking upon and along the track of the defendant company; that there was an open public road east of the track, and open spaces between the tracks, upon which the plaintiff might have walked with safety; that the train, at the time, was not moving at a greater speed than was allowed by law; and there was evidence, though conflicting, that the engineer and fireman, when they discovered the plaintiff upon the track, rang the bell, blew the whistle, and put the air brakes on, but not in time to stop the train and prevent the accident—Held: The plaintiff had no legal right to use, and there was no necessity for his walking along, the track of the defendant; and, in doing so, he assumed the risk of his conduct, and became a trespasser in law, for which action on his part he can not recover; and that, though the defendant, through its servants, may have been guilty of some degree of negligence on its part.

DAMAGES. Continued.

6. **ID.—PUBLIC HIGHWAY—RAILROAD CROSSING, LIABILITY FOR FAILURE TO CONSTRUCT—EVIDENCE.**—In such case, where the evidence was that plaintiff was walking along, not across, the track of the defendant, the fact offered to be proved by plaintiff, that the track crossed an old public highway near where plaintiff was injured, at which point defendant failed to provide a crossing, could avail plaintiff nothing; and the court did not err in excluding evidence of such fact.
7. **VERDICT, THE COURT MAY DIRECT, WHEN.**—Where the trial court is satisfied from the facts established that there is no right of recovery in the plaintiff, to the extent that the court would be compelled to set aside the verdict, it may, without error, instruct the jury to find for the defendant.—*Candelaria v. A., T. & S. F. R. R. Co.*, 266.
8. **DAMAGES, RAILROAD COMPANY—CONSTRUCTION OF ROAD ON STREET—ABUTTING PROPERTY.**—The owner of property abutting on a street or highway, which has been diverted from its original purpose, by the construction of a railroad along the street or highway, is not deprived of the right to compensation, where such diversion entails a hardship upon such owner not common to the general public.
9. **ID.—APPRAISEMENT—SECTION 2667, COMPILED LAWS.**—Such occupation of a street or highway is not such a taking as would authorize a proceeding under section 2667, Compiled Laws, providing the mode of ascertaining the damages inflicted by the taking of "land, water, timber," etc., by a railroad.
10. **ID.—ASSESSMENT OF—EVIDENCE—RULE.**—In determining the damages, in such case, under the issue as to the value of the abutting property, it was error to permit the witnesses to state their opinion as to the amount of damages inflicted on plaintiff by the construction of the road. The rule of damages in such cases is the value of the property immediately before and after the construction of the road, and the examination of the witnesses should be confined to such facts and circumstances as go to determine the value of the property, and the nature of the injury, from which the jury may draw its own conclusions.
11. **ID.—ADMISSION OF INCOMPETENT EVIDENCE, HARMLESS ERROR, WHEN.**—In an action for damages, in such case, when it appears from the facts presented to the jury that the verdict is fully sustained by competent evidence, and that the amount of the verdict could not be reduced on a new trial, the erroneous admission of incompetent testimony, placing the damages at an amount largely in excess of that found by the jury, is no cause for reversal, where the defendant has not been prejudiced thereby, and it appears that, upon the whole case, substantial justice has been done.—*New Mexican R. R. Co. v. Hendricks*, 611.

See, also, **CONTRACT FOR SALE OF LAND**, 3.

DECEIT. See **DAMAGES**, 4.

DECLARATION. See **ASSUMPSIT**, 1; **CRIMINAL LAW**, 1; **DAMAGES**, 4.

DEFECT OF TITLE. See **CONTRACT FOR SALE OF LAND**.

DEPOSITION OF WITNESS ABSENT FROM TERRITORY. See WITNESS, 2.

DISINCORPORATED CITIES.

1. **DISINCORPORATED CITIES, PRESENTATION OF CLAIMS AGAINST.**—In a suit, by bill in equity, against the board of county commissioners of San Miguel county, to compel the payment of a claim against the former city of Las Vegas, disincorporated under chapter 38, Laws, 1884, by the levy of a special tax for that purpose, where it appeared plaintiff held warrants issued by said city on its treasurer before its disincorporation, and presented them to the treasurer of said county for payment, without having presented them to said board for allowance, as required by section 3 of said act, and, on refusal of payment, brought suit—Held: The county was, solely by operation of the statute, a mere auditing and collecting agent for the creditors of the defunct corporation, with power to collect, by the levy of a special tax, out of the assets of the deceased city, a sufficient sum to pay all claims duly presented and allowed. Plaintiff not having presented his claim for allowance, as required by section 3, chapter 38, Laws, 1884, can not recover.
2. **ID.—LIMITATION**—Where, in such case, it further appeared that the claim in question was not presented within the period prescribed by section 3 of the statute cited supra—Held: While, in its view of this case, the court does not deem it necessary to pass upon the question of the legality or reasonableness of the six months' limitations, it is of the opinion that the period prescribed is reasonable and mandatory, and that a claim not presented within that period, without legal excuse, is barred by the statute.—County Comm'rs v. Pierce, 324.

DISTRICT ATTORNEYS.

DISTRICT ATTORNEYS, PAYMENT OF FEES OF—ACT FEBRUARY 26, 1891—CONSTRUCTION OF STATUTES.—Held: That clause of the finance bill of February 26, 1891, appropriating \$7,000 for the "salary fund of district attorneys," includes the fees as well as salaries of such attorneys, and when there is a balance in the territorial treasury, sufficient for the purpose, it is subject to the payment of such fees.—Perez v. Territory ex rel. Whiteman, 618.

EASEMENT. See WATER RIGHT, 1.

EJECTMENT. See MINING CLAIM, 2; PUBLIC LANDS, 3.

ELECTIONS.

1. **ELECTIONS—MANDAMUS TO COMPEL COUNTY COMMISSIONERS TO CANVASS RETURNS—EVIDENCE—VALIDITY OF JUDGMENT—PRESUMPTION.**—On a proceeding by mandamus against the county commissioners of Santa Fe county to compel them, among other things, to canvass an election certificate from precinct number 8, where it appeared the certificate had been purloined, and a copy thereof was admitted in evidence, and the only objections made by defendants to its admission were, that it was not the original, and that it was not authenticated as required by law, but the genuineness of the signatures thereto was not challenged, and that was all the evidence disclosed by the bill of exceptions—Held: It not appearing that any proper objection was raised to the instrument when offered, the court below may have found that it was one of the instruments authorized by sections 1196, 1197, Compiled Laws, and this court will presume that it did so find, and did not, therefore, err in admitting it in evidence.

ELECTIONS. Continued.

2. In such case, where the facts and proofs are submitted to the court, without a jury, all the evidence should be embodied in the record. In the absence of such showing in the bill of exceptions the court may indulge every reasonable presumption in favor of the validity of the judgment.—*Sloan v. Territory ex rel. Reed*, 80.

ELECTION CONTEST.

1. **ELECTION CONTEST—COUNTY SEAT, ELECTION TO LOCATE—PLEADING—EVIDENCE.**—In a proceeding, by bill in equity, to contest an election to locate a county seat for San Juan county, which, it was admitted, sufficiently alleged the casting of illegal votes, by minors, nonresidents, aliens, and persons procured to vote by bribery, naming persons who had voted illegally, and charging that numerous other persons unknown to the complainants, had voted at said election “illegally and fraudulently,”—it was not error to admit evidence of illegal voting by persons other than those named in the bill.
2. **ID.—AMENDMENTS—PLEADING.**—In such proceeding, an amendment to the bill, to conform to the proof, naming such other persons, who, it was charged, had voted illegally, was properly allowed after the testimony was closed, under section 1911, Compiled Laws, providing that each party shall have leave to amend “at any time before verdict, judgment, or decree,” upon such terms as the court may think proper.
3. **ID.—DECLARATIONS OF VOTER—EVIDENCE.**—Evidence of the declarations of one, who voted at such election, as to his qualifications as to residence and the town he voted for, was by itself, inadmissible, as was also an affidavit made by him sometime afterward as to the fact of his citizenship by naturalization, in the absence of any evidence that any effort had been made to take his deposition.
4. **ID.—CERTIFICATE OF PRIEST—EVIDENCE.**—The certificate of a priest, who had baptized a person, as to the age of such person, is inadmissible.
5. **ID.—PLEADINGS—EVIDENCE.**—In an election contest to locate a county seat, where the bill alleges that a certain person voted for a certain town, and such allegation is not denied by the answer, it will be taken as admitted.
6. **ID.—QUALIFICATION OF VOTERS—NATURALIZATION—CERTIFICATE OF CITIZENSHIP.**—Under section 1141, Compiled Laws (Organic Act, sec. 6), providing that the right of suffrage shall be exercised only by citizens of the United States, and sections 2004, 2165, Revised Statutes, United States, providing that all citizens of the United States, otherwise qualified by law to vote at any election, etc., shall be entitled to vote, and that foreigners of twenty-one years of age, with certain exceptions, must make a preliminary statement of their intention to become citizens at least two years before legally made such,—a person of foreign birth, not within the exceptions named in the statute, who did not take out his citizenship papers until after he had voted, and whose father was not naturalized until after he had attained his majority, was not a qualified voter.
7. **ID.—CITIZENSHIP—PROOF.**—The certificate of intention to become a citizen of the United States is the only competent proof of that fact.

ELECTION CONTEST. Continued.

8. **ID.—QUALIFICATION OF VOTERS—SECTION 2166, REVISED STATUTES, UNITED STATES, CONSTRUED.**—An alien who had served in the marine service of the United States, and had been honorably discharged, but who had not been naturalized, was not a legal voter, under section 2166, Revised Statutes of the United States, providing that any alien over twenty-one years of age, who has enlisted in the armies of the United States, and been honorably discharged, may become a citizen after one year's residence without any previous declaration of his intention to do so, the statute only intending to exempt such persons from making the declaration of intention.
9. **ID.—PARTIES TO RECORD—EVIDENCE.**—In a proceeding to contest an election, locating a county seat, all persons voting at such election are parties to the proceeding, though not made parties, for the purpose of admitting evidence of their declarations as to their qualifications and motives in voting for a particular town, when the fact that they voted for such town has first been established by evidence aliunde.
10. **ID.—BRIBERY—EVIDENCE.**—Where, in such proceeding it appeared from the evidence that a company organized in the interest of Junction City, one of three towns competing for the location of the county seat, previously and up to the day of election, and not afterward, issued to voters of the county certificates of sale of valuable lots, for which there was no consideration, and upon the presentation of which deeds were to be made on the payment of \$1 per lot, but not until after the election, by a limited time after which none would be made; and there was evidence that these payments were not to be made for the lots, but for making the papers; also that the subject of voting for Junction City was mentioned whenever a certificate was issued,—Held: The issue of such certificates of sale of lots to voters, and deeds to be made to them, was an "inducement," within the meaning of section 4, chapter 135, Laws, 1889, to vote for Junction City, and constituted bribery, although the voters receiving them testified they were not given for that purpose, and that they were not influenced thereby, upon the showing that the offer was illegal, and of the acceptance, the jury might well presume, in the absence of contradictory evidence, that the taking was illegal.
11. **ID.—BARGAIN FOR VOTES.**—Where it further appeared, in such proceeding, that before the election a committee from a voluntary association of citizens of the town of Largo, organized in its interests, with the intention at first of entering the contest for the location of the county seat, met a committee from an association of the town of Aztec; and it was agreed between them that the latter association should give to the former one half of its town lots and a certain portion of a forty acre lot, and pay them for a certain piece of land they had purchased in Largo for county purposes, in consideration that Largo would withdraw from the contest, and that the Largo people would work for Aztec,—Held: The Largo association was not a legal organization, the acts of whose representatives could bind any one but themselves, unless there was proof positive that the voter presumed to have been represented was shown to have directly authorized someone to act for him, and votes in favor of Aztec by residents of Largo, not parties to the agreement, were not illegal, in the absence of such proof, or that they received any benefit from the agreement. But those votes cast for Aztec, by residents of Largo, who were parties to such agreement, were illegal.

ELECTION CONTEST. Continued.

12. **ID.—QUALIFICATIONS OF VOTERS—RESIDENCE.**—A person formerly residing in this territory does not forfeit his right to vote by absence from the territory for the time specified in section 1214, Compiled Laws, providing that a citizen to be entitled to vote must be a resident of the territory, county, and precinct for a certain time “immediately preceding the election,” unless it be shown it was his intention to change his residence; the mere fact of his being out of the territory with a camping outfit was not sufficient to show such intention.
13. **ID.—QUALIFICATION OF VOTERS—CHANGE OF RESIDENCE.**—A married man who moves his family outside of the territory, and there rents and cultivates a farm, shows, by such act, his intention to change his residence, and is not a qualified voter.—*Berry et al. v. Hull et al.*, 643.

EQUITY. See **INJUNCTION**, 1; **WILLS**, 1.

ERROR. See **ATTACHMENT**, 4; **CRIMINAL LAW**, 12.

ERROR, WRIT OF.

ERROR, WRIT OF—REVIEW OF ORDER SETTING ASIDE DEFAULT.—An order of the district court setting aside a judgment by default, and permitting the defendants to plead to the declaration, is a matter within the discretion of that court, and not such an order as may be reviewed by this court, while the suit is pending there. *Territory v. Las Vegas Grant*, 87.

ESTOPPEL. See **DAMAGES**, 4; **COUNTY BONDS IN AID OF RAILROADS**.

EVIDENCE. See **ATTACHMENT**, 6; **CRIMINAL LAW**, 7, 8, 13, 15, 25, 26, 27, 29; **CONTRACTS**, 1, 2, 3, 4; **CONTRACT OF GUARANTY**, 1; **CONTRACT FOR SALE OF LAND**, 5, 6; **CONTRACT OF SALE**, 1, 2; **CORPORATIONS**, 2, 3; **COUNTY BONDS IN AID OF RAILROADS**, 6, 7, 10; **DAMAGES**, 1, 2, 6, 10, 11; **ELECTION CONTEST**, 1, 3, 4, 5, 9, 10; **ELECTIONS**, 1; **MINING CLAIM**, 1.

EXCEPTIONS. See **CRIMINAL LAW**, 2, 3, 39; **CORPORATIONS**, 1.

FAILURE OF TITLE. See **CONTRACT FOR SALE OF LAND**, 8.

FEEs OF DISTRICT ATTORNEY. See **DISTRICT ATTORNEYS**, 1.

FINDINGS. See **ATTACHMENT**, 1; **CORPORATIONS**, 2.

FOREIGN CORPORATIONS. See **CORPORATIONS**, 5.

FORFEITURE. See **CORPORATIONS**, 6.

FRAUD. See **ATTACHMENT**, 3; **CORPORATIONS**, 2; **WILLS**, 1.

GARNISHMENT.

1. **GARNISHMENT—ANSWER—ISSUE—BURDEN OF PROOF—VERDICT.**—In a proceeding by garnishment, by a judgment creditor, under an execution issued upon the judgment against a debtor of the defendant in the execution, under section 2159, Compiled Laws, where the garnishee answered that he was not indebted to the defendant, that he had no property in his possession belonging to defendant, and that his transactions with him were not fraudulent, the issue was not only as to the facts of indebtedness and fraud, but also as to the amount of indebtedness; and a verdict of the jury simply that the answer was not true was a finding only upon a part of the issue unauthorized by the statute, and insufficient to support a judgment.—*Patterson v. U. S.*, 2 Wheat. 222.

GARNISHMENT. Continued.

2. The answer of the garnishee was prima facie evidence of the facts therein set forth, throwing the burden of proof on the execution plaintiff; and evidence offered to controvert the answer presented an issue of fact for the jury. The court, therefore, erred in directing the jury to find for the plaintiff.—*Perea v. Colorado Nat. Bank*, 1.
3. **GARNISHMENT—MORTGAGEE IN POSSESSION WITH OPTION TO PURCHASE.** Where a creditor, in pursuance of a written contract between himself and his debtors, defining their respective rights and obligations, took possession of the property of the debtors, as mortgagee in possession after condition broken, with the conceded right to purchase the same for a certain sum less the amount of the mortgage debt, interest, and expenses, on or before a certain date, the debtors obligating themselves to sell and convey to him the property on said terms, provided they had not previously paid to him the full amount of the debt due him—Held: The contract fixed the relations of the parties, as mortgagor and mortgagee, and until there was a change in those relations, by a foreclosure of the mortgage and purchase of the premises at a sale, in case of a failure or refusal of the debtors to pay the debt or convey the property as agreed, the creditor could not become a vendee in possession, legally liable for the whole or any part of the purchase price of the premises, so as to render him subject to be charged in a garnishee proceeding under section 2159, Compiled Laws, 1884. By this section it is essential that the debt be in existence at the time of the service of the garnishment process, owing and payable at the present time or some future time, absolutely and unconditionally.—*Garland v. Sperling Bros.*, 623.

GRAND JURY. See **CRIMINAL LAW**, 10.

IMPEACHMENT OF WITNESS. See **CONTRACTS**, 3.

INDICTMENT. See **CRIMINAL LAW**, 34, 36.

INJUNCTION.

1. **INJUNCTION—MULTIPLICITY OF SUITS—JURISDICTION—EQUITY.**—Where a bill in equity was brought by the rightful owners of certain land to restrain the defendants, who, under an inchoate grant from the Mexican government, sought to appropriate, irrigate, and improve a part thereof to complainants' injury, from such appropriation and improvement, such owners, having no adequate remedy at law, without a multiplicity of suits and payment for such improvements under section 2270, Compiled Laws, 1884, the court had jurisdiction to grant the relief sought as to such portion of said land.
2. **ID.—ADVERSE POSSESSION—REMEDY.**—But, in such case, as to that portion of the land which had been in the actual, open, notorious, and adverse possession of the defendants, who had actually cultivated portions of it, and appropriated a portion of the water of a river running through the land for purposes of irrigation, complainants' remedy was by an action of ejectment at law. Equity will not interfere to restrain the enjoyment of such improvements, but will prevent the appropriation of new lands and the making of new improvements for further irrigation.—*Waddington et al. v. Robledo et al.*, 347.

INJURY TO RAILROAD EMPLOYEE. See **TRESPASS ON CASE**.

INSANITY, PLEA OF. See **CRIMINAL LAW**, 20.

INSTRUCTIONS. See ATTACHMENT, 2, 6; CRIMINAL LAW, 4, 6, 14, 19, 21, 22, 23, 26, 27, 28, 29, 30, 31; CONTRACTS, 4; CONTRACT OF SALE, 1; CONTRACT FOR SALE OF LAND, 9; DAMAGES, 2, 3; MINING CLAIM, 2; TRESPASS ON CASE, 2.

INTEREST COUPONS. See COUNTY BONDS IN AID OF RAILROADS, 1, 6.

INTERLINEATION OF INSTRUCTIONS. See CONTRACT FOR SALE OF LANDS, 9.

ISSUE OF STOCK. See CORPORATIONS, 3.

JUDGMENTS. See ASSUMPSIT, 1; CRIMINAL LAW, 2, 40; ELECTIONS, 1; REPLEVIN, 1.

JURY, IMPANELING OF. See CRIMINAL LAW, 3.

JURY, CHALLENGE TO ARRAY OF. See CRIMINAL LAW, 11.

JURISDICTION. See CRIMINAL LAW, 2; INJUNCTION, 1; WILLS, 1.

LARCENY. See CRIMINAL LAW, 13.

LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW SERVANT. See TRESPASS ON CASE, 1.

LIMITATION. See COUNTY BONDS IN AID OF RAILROADS, 3, 4; DISINCORPORATED CITIES, 2; MEXICAN GRANT, 1; PUBLIC LANDS, 1.

LIS PENDENS, NOTICE OF. See ATTACHMENT, 8.

LOST DEED. See CONTRACT FOR SALE OF LAND, 7.

MANDAMUS. See ELECTIONS, 1; SCHOOL FUNDS, 1; TAX SALE, 3.

MARRIAGE CEREMONY. See CRIMINAL LAW, 8.

MASTER'S REPORT. See CORPORATIONS, 1.

MECHANICS' LIEN.

1. **MECHANICS' LIEN—SUFFICIENCY OF NOTICE—SEC. 1524, COMP. LAWS, 1884—CONSTRUCTION OF STATUTES.**—Statutes providing for mechanics' liens are in derogation of the common law, and, as such, must be strictly construed. By a strict construction is not meant an arbitrary or inequitable construction, or such as would give the owner, or third parties, an opportunity to take advantage of legal technicalities to deprive the laborer of his just wages, but such a construction as will require a substantial compliance with the statute; and this requirement of the statute (Comp. Laws, 1884, sec. 1524) is met by a notice which alleges that the debtor "was the owner or reputed owner" of the property. *Finane & Elston v. Las Vegas H. and Imp. Co.*, 3 N. M. (Gil.) 415; *Hobbs v. Spiegelberg*, Id. 362, distinguished.

2. **ID.—VERIFICATION OF NOTICE—SUFFICIENCY OF.**—A verification to a notice of lien which states that the "abstract of indebtedness mentioned and described in the foregoing notice is true and correct" is not a sufficient compliance with the statute, which, after prescribing the several statements which shall be embodied in the claim, requires that the "claim must be verified." Sec. 1524, Comp. Laws, 1884.—*Minor v. Marshall*, 194.

See, also, ATTACHMENT, 8.

MEMORANDUM TO REFRESHEN MEMORY. See ATTACHMENT, 5.

MERGER OF FRAUDULENT REPRESENTATIONS IN CONTRACT.

See CONTRACT FOR SALE OF LANDS, 3.

MEXICAN GRANT.

1. **MEXICAN GRANT—ADVERSE POSSESSION—LIMITATION.**—In a suit for the possession of land granted by the Mexican government prior to the cession, and claimed by plaintiff under a title derived through the collateral heirs of the original grantee, who, it was alleged, had died intestate in 1848, where neither the plaintiff nor any of those through whom he claimed had ever been in possession of the land since that time, and defendant had maintained an open, adverse, continuous, possession of the same under claim of title in fee simple thereof through the grant and act of confirmation, for more than ten years before the bringing of the action, such possession was a bar to plaintiff's right of recovery, under section 1880, Compiled Laws, 1884.
2. **ID.—WILL—ATTESTATION—VALIDITY.**—A written will executed before an alcalde or judge of the first instance, and attested by two witnesses, in New Mexico, while a part of the government of Mexico, according to a custom which had obtained for at least one hundred years and been recognized as having the force of law, though not in accordance with the Mexican law requiring such wills to be executed before a notary and attested by seven witnesses, is valid ex necessitate; the Mexican government never having provided the dependency of New Mexico with such an officer before whom wills could be executed according to law.—*Gildersleeve v. New Mexico Mining Co. et al.*, 27.

MINING CLAIM.

1. **MINING CLAIM—POSSESSION—TITLE—EVIDENCE.**—An open, visible, and actual possession of land by a person claiming to be the owner is prima facie evidence of title in the person so possessed. By "prima facie" is meant evidence sufficient to establish title until a better title is shown.
2. **ID.—PATENT—EJECTMENT—INSTRUCTIONS.**—In an action of ejectment for the recovery of a mining claim, under section 1570, Compiled Laws, held by plaintiff under a patent from the United States, which was admitted in evidence, an instruction of the court that, if plaintiff's vein was within lines formed by artificial monuments which were placed around it at the time of the survey for patent, it would make no difference whether the monuments and survey were properly connected with the surveys of the public lands, that the location of the monuments would determine and control the location of the vein, was a proper instruction, and settled the description of the land in the patent to be the locus in quo of the land in controversy.
3. **ID.—ADJOINING OWNERS—BURDEN OF PROOF.**—In such case, where it appeared defendants had entered into the land included within the side lines of the patent, and taken large quantities of ore therefrom, and their defense was that, as owners of an adjoining claim, they had followed a lode, on its dip, the apex of which was within their claim, within the side lines of plaintiff's claim extended downward vertically as, they claimed, they were authorized in such case by act of congress—Held: Plaintiff having established a prima facie case when the defendants undertook to show that, by a certain act of congress, they were given the right to follow a lode from the sides

MINING CLAIM. Continued.

of their claim on to the plaintiff's, and take ore therefrom, the burden of proof as to the existence of such facts as are contemplated by that act, and of their compliance with its provisions, shifted, and was upon them.—*Bell v. Skillicorn et al.*, 399.

MORTGAGEE IN POSSESSION WITH OPTION TO PURCHASE. See **GARNISHMENT**, 3.

MULTIPLICITY OF SUITS. See **INJUNCTION**, 1.

MURDER. See **CRIMINAL LAW**, 8, 11, 15, 19, 20, 21, 37.

NATURALIZATION. See **ELECTION CONTEST**, 6.

NEGLIGENCE. See **DAMAGES**, 5; **TRESPASS ON CASE**.

NEWLY DISCOVERED EVIDENCE. See **CRIMINAL LAW**, 24.

NEW TRIAL. See **CRIMINAL LAW**, 5, 24, 39.

NOTICE OF MECHANICS' LIEN. See **MECHANICS' LIEN**, I, 2.

ORDER OF RESTITUTION AFFECTING RIGHTS OF STRANGER TO RECORD. See **REPLEVIN**, 1.

PATENT. See **MINING CLAIM**, 2; **PUBLIC LANDS**, 1.

PARTIES TO RECORD. See **ELECTION CONTEST**, 9.

PENAL STATUTES, CONSTRUCTION OF. See **SELLING LIQUORS ON SUNDAY**, 1.

PERJURY. See **CRIMINAL LAW**, 4, 7, 34.

PLEADINGS. See **CRIMINAL LAW**, 1; **DAMAGES**, 1; **ELECTION CONTEST**, 1, 2, 5.

PRACTICE ON APPEAL.

1. **PRACTICE ON APPEAL—ASSIGNMENT OF ERRORS—WRIT OF ERROR—DISMISSAL.**—On a motion for dismissal of an appeal or writ of error and affirmance of judgment, for failure to comply with section 2189, Compiled Laws, providing that, in default of making and filing an assignment of errors on or before the first day of the term to which the cause is returnable, "the appeal or writ of error may be dismissed, and the judgment affirmed, unless good cause for such failure be shown," the sudden and unexpected impoverishment of an appellant or plaintiff in error is not "good cause," within the meaning of the statute, for failure to comply therewith, and will not be heard as an excuse for such failure.
2. **ID.—RULE 25, SUPREME COURT—ASSIGNMENT OF ERRORS—WRIT OF ERROR—DISMISSAL.**—On such motion, where the appellant or plaintiff in error has made an assignment of errors, and incorporated it in a transcript containing a statement of the cause and brief, and had the same properly filed, but has failed to file the assignment, written on a separate paper, as required by rule 25 of the supreme court, the appeal or writ of error will be dismissed.
3. **ID.—ASSIGNMENT OF ERRORS—FILING OF SEPARATE PAPER—AFFIDAVIT.**—Where, on a motion to set aside an order dismissing an appeal and affirming judgment, an affidavit of counsel filed, though it

PRACTICE ON APPEAL. Continued.

does not show a technical compliance with rule 25 of the supreme court, shows that the assignment of errors was made on a separate paper and filed in the clerk's office; that the same was placed in the hands of the printer to be copied in the brief, and the brief shows that the same was copied as required by the rule; and affiant states that he supposed, and had good reasons to believe, the same had been forwarded with the record to the clerk of the supreme court,—Held: This was sufficient, under the provisions of the statute, as showing an honest effort to comply with the rule, and the order of dismissal will be set aside.—*Martin v. Terry et al.*, 491.

PRESCRIPTION. See **PUBLIC LANDS**, 1; **WATER RIGHT**, 1.

PRESUMPTION. See **ATTACHMENT**, 4, 6; **CRIMINAL LAW**, 2, 18; **COUNTY BONDS IN AID OF RAILROADS**, 9, 11; **ELECTIONS**, 1; **WILLS**, 3.

PROCESS, SERVICE OF. See **ATTACHMENT**, 7.

PROCESS COMPULSORY, FOR ATTENDANCE OF WITNESSES. See **CRIMINAL LAW**, 18.

PROOF. See **COUNTY BONDS IN AID OF RAILROADS**, 7; **CRIMINAL LAW**, 20, 34, 38; **ELECTION CONTEST**, 7; **GARNISHMENT**, 1; **MINING CLAIM**, 3.

PUBLIC HIGHWAY. See **DAMAGES**, 6.

PUBLIC LANDS.

1. **PUBLIC LANDS—PATENT—SPANISH GRANT—EJECTMENT—LIMITATION—PRESCRIPTION.**—In an action of ejectment for the recovery of land in New Mexico, claimed under a patent from the United States, held by defendant under claim of grant to his grantors from the king of Spain, while New Mexico was a province of Spain, and by virtue of an actual uninterrupted possession and cultivation of the land by him and his grantors continuously since 1825, and that if there never was such a grant, then his grantors had title by prescription, by long continued possession and cultivation under the Spanish and Mexican laws, recognized by the treaty of cession, where the defendant offered no title papers in support of his claim,—Held: If the defendant had any rights growing out of the claims set up by him to the land in controversy, they were of an inchoate nature, and, as has been held by the supreme court of the United States, such as have been reserved by congress to be determined by the political department of the government, or by such tribunal as may, by act of congress, be authorized to determine them; and this court has not been vested with such authority.—*Grant v. Jaramillo*, 313.

QUALIFICATION OF VOTERS. See **ELECTION CONTEST**, 6, 8, 12, 13.

RAILROADS, CONSTRUCTION OF ON STREETS. See **DAMAGES**, 8.

RAILROAD CROSSING, LIABILITY FOR FAILURE TO CONSTRUCT. See **DAMAGES**, 6.

RAPE. See **CRIMINAL LAW**, 25.

RATIFICATION OF AGENT'S ACTS. See **CONTRACTS**, 1.

REASONABLE DOUBT. See **CRIMINAL LAW**, 14, 21.

RESCISSION. See **CONTRACT OF SALE**, 1; **CONTRACT FOR SALE OF LAND**, 1, 2, 4.

RECOGNIZANCE. See **CRIMINAL LAW**, 1.

RECORDED BRAND OF ANIMAL. See **CRIMINAL LAW**, 13; **DAMAGES**, 2.

RECORDING OF CERTIFICATE OF TAX SALE. See **TAX SALE**, 2.

RENT. See **CONTRACT FOR SALE OF LAND**, 4.

REPLEVIN.

1. **REPLEVIN—JUDGMENT—ORDER OF RESTITUTION, AFFECTING RIGHTS OF STRANGER TO RECORD—REMEDY.**—In an action of replevin for the recovery of certain personal property detained, where the judgment was regular on its face, and not set aside, an order for restitution duly followed the judgment, as a necessary incident; and if its execution injuriously affected a stranger to the record, his remedy was by an independent action, and not by a summary proceeding affecting the judgment.—*Veeder v. Fiske*, 288.
2. **REPLEVIN—APPEAL FROM JUSTICE'S COURT TO DISTRICT COURT—AFFIDAVIT—AMENDMENT.**—Section 2443, Compiled Laws, providing for a trial de novo in all cases originating in a justice's court and removed into the district court, and that the district court shall allow all amendments "necessary in furtherance of justice," includes an action in replevin; and where, in such an action appealed to the district court, the affidavit failed to state the value of the property in controversy, an amendment was asked to correct the affidavit, and refused, the purpose of which was to secure a trial de novo on the merits, such amendment, so sought, was a "necessary amendment in furtherance of justice," and it was an abuse of the court's discretion to refuse to allow such amendment. *Martinez v. Martinez*, 2 N. M. 464.
3. **ID.—AFFIDAVIT—AMENDMENT—JURISDICTION.**—The contention, in such case, that the failure to allege the value of the property in question was jurisdictional, and could not be cured by amendment in the district court, was not well taken, and can not be sustained in view of section 7, chapter 48, Laws, 1889, which was in force at the time the cause was heard below, and which is in harmony with the decisions of this court in *Martinez v. Martinez*, supra, and *Sanchez v. Candelaria*, 5 N. M. 405, where it was held that if the application to amend had been made while the cause was pending before the justice, it would have been his duty to permit the amendment to be made, and that the plaintiff's right to amend was not lost by appeal to the district court. *Barruel v. Irwin*, 2 N. M. 223, distinguished.—*Romero v. Luna*, 440.

RESIDENCE. See **ELECTION CONTEST**, 12.

REVIEW OF ORDER SETTING ASIDE DEFAULT. See **ERROR, WRIT OF**, 1.

RULE IN STATU QUO. See **CONTRACT FOR SALE OF LAND**, 4.

SCHOOL FUNDS.

1. **SCHOOL FUNDS—MANDAMUS TO COMPEL DISTRIBUTION—CONSTRUCTION OF STATUTES.**—In a proceeding by mandamus, by the board of education of East Las Vegas, to compel the treasurer of San Miguel county to place to the credit of said board all moneys in his hands,

SCHOOL FUNDS. Continued.

and that might be received by him, derived from licenses for the sale of intoxicating liquors within said town, and to pay said moneys, when collected, to the treasurer of said board, where the question was whether said funds belonged to the general school fund, to be apportioned and distributed to all of the school districts of said county, or whether such funds were to be placed to the credit of and paid to the school district of said town, the appellees relying upon section 35, chapter 25, Acts, 1891, which was enacted and became a law February 12, 1891, and the appellant upon section 3, chapter 9, Acts, 1891, enacted February 2, 1891, but which did not take effect until May 1, 1891—Held: The former act, having been enacted subsequently to the latter act, must prevail as the latest expression of the legislature. The latter act having made no provision for the distribution of the fund, the presumption is the legislature then had in mind the passage of the former act, which provides that the license money shall be placed to the credit of the several school districts, and not to the general school fund of the county.

2. Chapter 77, which is amendatory of chapter 25, section 1, provides that the three mill tax shall be paid direct to the county treasurer instead of the territorial treasurer, as provided in chapter 25; and section 9 of chapter 77 provides for boards of education in incorporated cities and towns. The appellees are within the provisions of this act, and therefore entitled to the relief sought herein.—Board of Education of East Las Vegas v. Tafoya, 292.

SELLING LIQUORS ON SUNDAY.

SELLING LIQUORS ON SUNDAY—PENAL STATUTES, CONSTRUCTION OF.—Chapter 26, Laws, 1887, amending section 933, among other things, by omitting the words "selling * * * or liquors, or any other property," and imposing the penalty on anyone found on Sunday "engaged in any labor, except works of necessity, charity, or mercy," did not restrict the ordinary meaning of the words "engaged in any labor," and any person selling liquors on Sunday is engaged in "labor," within the meaning of the amendatory act.—Cortesy v. Territory, 682.

SIGNATURE WITH SCROLL. See CONTRACT OF GUARANTY.

SPANISH GRANT. See PUBLIC LANDS, 1.

SPECIAL TERM OF DISTRICT COURT. See CRIMINAL LAW, 40.

STATUTES, CONSTRUCTION OF.

STATUTES—SECTION 2, CHAPTER 94, LAWS, 1891, CONSTRUED.—In a proceeding by mandamus, by the holder of a territorial warrant, against the governor, auditor, and treasurer of the territory, to compel them to issue to him in lieu thereof territorial interest-bearing bonds in conformity with the provisions of section 6 of an act of February 8, 1889, in relation to the finances of the territory, based on section 2, chapter 94, Laws, 1891, which was part of an amended bill in the hands of a committee, appointed to make amendments, who, finding it impossible to rewrite the same before the hour of final adjournment of the session by limitation, inserted after section 1, and directly above section 2, formerly unamended for want of time, a note that, "the amendments in section 2 coincide with those of preceding section throughout, and amendments and notes to be changed to same"—Held: The provisions cited, taken from the unamended section

STATUTES, CONSTRUCTION OF. Continued.

2, authorizing the governor and treasurer to take up outstanding warrants for indebtedness against the territory, and issue in lieu thereof interest-bearing bonds, were never passed by the legislature, and the peremptory writ was properly denied.—Territory ex rel. Dudrow v. Prince et al., 635.

See, also, CRIMINAL LAW, 19; DISTRICT ATTORNEYS, 1; ELECTION CONTEST, 8; MECHANIC'S LIEN, 1; REPLEVIN, 2; SCHOOL FUNDS, 1.

STATU QUO. See CONTRACT FOR SALE OF LAND, 4.

STIPULATION BY ATTORNEYS, AMENDATORY OF PLEADINGS.

See COUNTY BONDS IN AID OF RAILROADS, 5.

STOCKHOLDERS. See CORPORATIONS, 4.

SUBSCRIPTION. See CORPORATIONS, 1, 4.

TAX SALE.

1. TAX SALE—CERTIFICATE OF PURCHASE, ASSIGNMENT OF—SECTION 2885, COMPILED LAWS, 1884—CONSTRUCTION OF STATUTES.—The writing of his name in blank by the purchaser on the back of a certificate of tax sale is not sufficient to constitute an "indorsement," within the meaning of section 2885, Compiled Laws, providing that such certificate "shall be assignable by indorsement." By the words "assignable by indorsement," is meant that the assignment itself as well as the name of the assignor shall be written upon the instrument; and a holder of such a certificate, signed on the back by the purchaser in blank, is not authorized to write an assignment above such signature.
2. ID.—RECORDING OF CERTIFICATE—TITLE.—The mere delivery to another of a certificate of tax sale by the original purchaser, with his name written in blank on the back, vests no right or title in the holder. Under section 2885, Compiled Laws, before the right and title of the original purchaser of such certificate can vest in an assignee or his legal representatives, the assignment must be entered upon the record of sales in the office of the probate clerk, and such entry must be made before any rights of innocent parties, acquired under such certificate, intervene.
3. ID.—CERTIFICATE OF PURCHASE—MANDAMUS BY HOLDER TO COMPEL SHERIFF TO EXECUTE DEED.—In a proceeding by mandamus, by a holder of a certificate of tax sale, indorsed in blank by the original purchaser, to compel the sheriff and ex officio collector of Bernalillo county to execute and deliver to him a deed to the land sold, where it appeared that the defendant, by the order of the board of county commissioners, had previously made and delivered to the administrator and legatee of the original purchaser a deed to the land, after the time of redemption had expired; that the proceedings before the board were regular; and that, at the time of the execution and delivery of the deed, there was no assignment of such certificate of record in the office of the probate clerk,—Held: The sheriff had no power to execute a second deed to the land, while the first deed remained uncanceled, and the court below properly refused to grant a peremptory writ of mandamus to compel him to do so.—Territory ex rel. Gildersleeve v. Perea, 531.

TESTIMONY, ADMISSION OF AFTER CLOSE OF EXAMINATION.

See CRIMINAL LAW, 35.

TESTIMONY AS TO TRANSACTIONS WITH PERSON SINCE DECEASED. See WITNESS, 1.

TITLE. See CONTRACT FOR SALE OF LAND, 2, 8; DAMAGES, 3; MINING CLAIM, 1; TAX SALE, 2.

TRESPASS. See DAMAGES, 5.

TRESPASS ON CASE.

1. **TRESPASS ON CASE—LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW SERVANT.**—It was not the intention of the legislature, in the enactment of sections 2308–2310, Compiled Laws, to change the common law rule exempting a master from liability to his servant for the negligence of a fellow servant.
2. **ID.—INJURY TO RAILROAD EMPLOYEE—INSTRUCTION TO FIND FOR DEFENDANT—EVIDENCE.**—In an action of trespass on the case against a railroad company for damages for the negligent killing of plaintiff's former husband, an employee of the company, where the evidence was of such character that, had the jury found for the plaintiff, it would have been the duty of the court to set aside the verdict, the court did not err in directing a verdict for the defendant.
3. **ID.—INJURY TO RAILROAD EMPLOYEE—NEGLIGENCE OF FELLOW SERVANTS—PROXIMATE CAUSE—LIABILITY.**—Where, in such action, the declaration alleged that the defendant failed to furnish the deceased, who was in the defendant's employ as a freight conductor, with a properly constructed car such as was ordinarily used upon its road, but instead thereof wrongfully, negligently, and over deceased's protest, furnished him with an unsafe box car without doors or windows in the ends, or cupola in the top, through which approaching danger might be seen and averted, which deceased was induced to use upon the promise of defendant's agents that he would be furnished with a proper car in a very short time, but which defendant failed to do; that, through the negligence of its servants, one of defendant's trains ran against the rear of the train driven by deceased, broke the same into splinters, and deceased was struck by its locomotive and flying splinters, and died from the effect of the injuries thus received; and there was no allegation that the accident was the result of deceased's not being able to see the approaching danger by reason of the absence of the windows and cupola in the car,—Held, on demurrer: The proximate cause of the accident was the negligence of the fellow servants operating the second train, not the failure of defendant to furnish a proper car. The action can not therefore be sustained. Nor could it be sustained if it were conceded that the proximate cause was the joint negligence of the deceased's fellow servants and the failure of defendant to furnish, within a reasonable time, a proper car.—Lutz v. Atlantic & Pacific R'y Co., 496.

TRIAL. See CRIMINAL LAW, 2.

TRIAL DE NOVO. See CRIMINAL LAW, 9.

TROVER. See DAMAGES, 1.

TRUST DEED. See CONTRACT FOR SALE OF LAND, 5, 6.

USURY. See CORPORATIONS, 5, 6.

VARIANCE. See CRIMINAL LAW, 34.

VENUE. See **CRIMINAL LAW**, 37.

VERDICT. See **CRIMINAL LAW**, 15, 32, 33; **CONTRACT OF SALE**, 2; **DAMAGES**, 7; **GARNISHMENT**, 1; **WITNESS**, 3.

VERIFIED ACCOUNT. See **CONTRACT OF SALE**, 2.

WAIVER. See **CRIMINAL LAW**, 39.

1. **WATER RIGHT—PRESCRIPTION—EASEMENT.**—The adverse, continuous, uninterrupted use, for a period of twenty-one years, for milling purposes, of the water of an artificial ditch or acequia, supplied from a nonnavigable stream, with the knowledge and acquiescence of the owners of the adjoining land over which the water flowed, is sufficient to establish an easement, in the absence of any evidence of permission or license; and a subsequent purchaser of and locator on such land takes subject to such easement, having only a qualified right to the use of so much of the water as will not deprive the prior proprietor and locator of sufficient to operate his mill.—*Trambley v. Luterman*, 15.
1. **WILL—FRAUD—EQUITY—JURISDICTION OF DISTRICT AND PROBATE COURTS.**—Section 10 of the organic act, providing that the judicial power of the territory shall vest in the supreme court, district courts, probate courts, and justices of the peace, and that the jurisdiction of the several courts “shall be as limited by law,” does not confer chancery jurisdiction on probate courts. Such jurisdiction is inconsistent with the nature and scope of such courts. *Ferris v. Higley*, 20 Wall. 375. Therefore a suit by the wife of the testator against the administrator for relief from a receipt fraudulently obtained by him, by which she released her right in her deceased husband’s estate, valued at \$6,000, being an equitable demand, was properly brought by bill in the district court.
2. **ID.—CODICIL, VALIDITY OF, POWER OF PROBATE JUDGE TO DECLARE.** Under sections 1446–1449, *Compiled Laws*, the probate judge has no power to declare a will or codicil invalid, not executed according to statute (sec. 1380, *Comp. Laws*, 1884). But it is his duty in such case, to return the will or codicil to the person presenting the same, and such person may then present such will or codicil to the district court for a judicial determination of its validity, not by appeal, but by an original suit instituted in that court.
3. **ID.—BEQUEST, CONSTRUCTION OF—PRESUMPTION.**—A clause in a will bequeathing to the wife “all articles of goods in my house, personal furniture, household furniture, and all that exists therein,” will be held to include money in an iron safe in the house, not mentioned in the will, where the husband has sufficient means; the presumption being that he intended to make ample provision for her, to whom he owed protection and support.—*Perea v. Barela*, 239.

See, also, **MEXICAN GRANT**, 2.

WITNESS.

1. **WITNESS—TESTIMONY AS TO TRANSACTIONS WITH DECEDENT—SEC. 2082, COMP. LAWS, 1884.**—In a suit against an administratrix for an alleged balance due plaintiff for land sold to defendant’s intestate, the testimony of plaintiff as to his agreement with the deceased has no validity, under section 2082, *Compiled Laws*, unless corroborated by other material evidence.

WITNESS. Continued.

2. **Id.—DEPOSITION OF WITNESS ABSENT FROM TERRITORY.**—Section 2095, Compiled Laws, 1884, providing that where a witness is absent from the territory his deposition may be taken “to be used in any court in all civil cases,” applies as well to depositions taken for use in the probate court as in the district court.
3. **Id.—VERDICT, WHEN THE COURT MAY DIRECT.**—Where there is no evidence for the jury, or where the evidence is such the court, in the exercise of a sound discretion, would be called upon to set aside the verdict, and grant a new trial, if found for one party rather than the other, it is not only the right, but the duty, of the court to direct a verdict accordingly.—*Gildersleeve v. Atkinson*, 250.

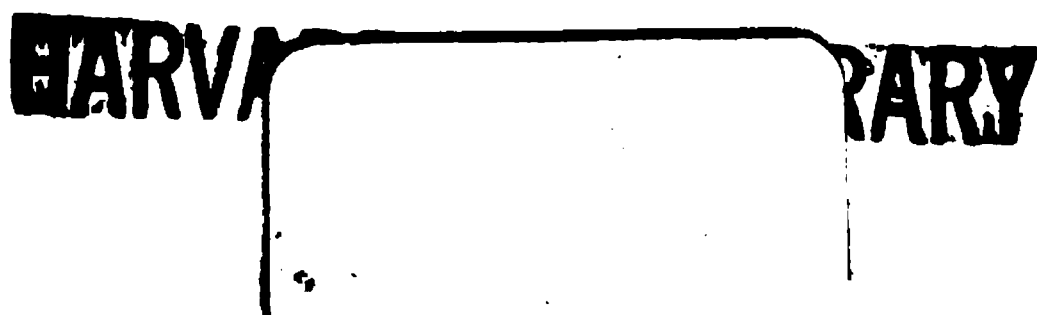
See, also, **CRIMINAL LAW**, 23, 35; **CONTRACTS**, 3.

WRITS. See **ATTACHMENT**; **ERROR, WRIT OF. FOR EJECTMENT**, see **MINING CLAIM**, 2; **PUBLIC LANDS**, 3. **INJUNCTION. FOR MANDAMUS**, see **ELECTIONS**, 1; **SCHOOL FUNDS**, 1; **TAX SALE**, 3. **REPLEVIN**.

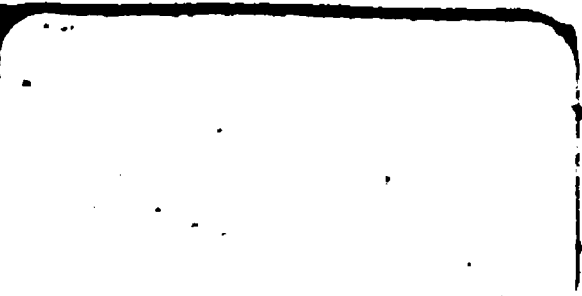
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